Supreme Court, U. S.
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APPENDIX

Volume 4.

IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-904

BRUNSWICK CORPORATION,

Petitioner,

v.

**PUEBLO BOWL-O-MAT, INC.,
BOWL-O-MAT PARAMUS OPERATIONS
and HOLIDAY BOWL-O-MAT, INC.,**

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

**PETITION FOR CERTIORARI FILED DECEMBER 24, 1975.
CERTIORARI GRANTED FEBRUARY 23, 1976.**

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[3266]

Q. Now, sir, there was this lease with an option clause in it signed by Brunswick, an act of Brunswick; isn't that right?

A. Yes.

[3267]

Q. But something happened in the middle of this trial and you cancelled the option; is that what you said in an answer to Mr. McNeill?

A. I said when I found out about it I had it immediately cancelled.

Q. You mean when you found out about this when the trial was on?

A. I was not a part of the trial at the time it was going on.

I'm sorry, sir, I didn't—that had no influence.

Q. Do you know the date when you had the option cancelled?

A. Approximately April 11, 12, some place in there.

Q. Some place in there?

A. Yes.

The Court: 1973?

The Witness: Yes, sir.

• • •

[3268]

Q. Are you looking at this April 12, 1973 letter?

A. Yes.

Q. Was this letter requested of you by the Rahway Recreation Realty Company?

A. No.

Q. Did they consent to this letter?

A. I don't know, sir.

Q. This letter has to do with part of an agreement, doesn't it, you had with Rahway?

A. Yes, sir.

Q. And part of that agreement had to do with an option which the Brunswick Corporation had obtained to purchase premises during the initial term of the lease; isn't that so, and also a right of first refusal to purchase the premises during any successive term, right?

A. I don't know, I never read the option.

Q. You have the letter in front of you. Isn't that what it says?

A. It says we are not going to do it.

[3269]

Q. But you had an option, did you not, before you said you weren't going to do it?

A. I don't understand what you're saying, sir.

Q. You know, Mr. Rudo, I am going to make it as simple as I can, and I wonder—well, that's not important.

The Witness: I didn't hear you.

Q. Just as well.

Before this letter of April 12, 1973, did Brunswick have an option on the Rahway premises to purchase the premises during the initial term of the lease?

A. I was informed that we had an option, and as soon as I found it out I saw that it was cancelled.

Q. Just answer my question.

The answer is yes, isn't it?

A. Yes.

Q. And before this letter of April 12 didn't Brunswick have a right of first refusal to purchase the premises during any successive term as provided under the lease?

Please answer yes or no.

A. Yes, sir.

Q. Now, sir, this option was embodied in an agreement, a lease, which had two signatures to it,

[3270]

did it not?

A. Yes.

• • •

[3274]

Are you suggesting here and now in this courtroom that that provision slipped past the eyes of your lawyer, that he didn't know that it was there?

A. I can only tell you what he told me, and that's what he told me when I investigated it, that he did not realize it, and he did not intend for it to be—

[3275]

Q. Did he tell you that this typed addendum, this typed agreement, was prepared by the other side; is that what he said to you?

A. I don't remember him saying anything about that, because I never inquired. All I was interested in is when I found out that this was there and it was against policy, that we weren't going to take the option, to eliminate it immediately.

Q. On how many occasions has this policy you refer to expressed itself in the form of leases?

A. It's the only one I know of.

Q. And this policy you are talking about is some kind of policy which applied only once, and that was to this particular addendum agreement, is that right?

A. No, sir.

Q. Well, you just said that, didn't you?

A. The policy—if I understood your first question—the policy is that we are not interested in purchasing any bowling centers. That is a very firm policy.

And if that agreement was made, it was made in error, and contrary to the policy. And that's what I have said, and I tried——

Q. When was that policy reached, when did Brunswick decide on that policy?

[3276]

A. On the 14 points, back when we first started BCO.
Q. And what was that policy, again?
A. That we would not purchase bowling centers.

Mr. McNeill: We can't hear you.

Mr. Hoffmann: I asked the question: What was the policy again? And the answer was: We would not purchase bowling centers.

Q. Is that correct?
A. Yes, sir.

Q. Now, sir, this option related to other matters than just the right to repurchase, didn't it?

A. I don't know. I never read it.

• • •

[3285]

Q. Sir, the language here gives to Brunswick, does it not, the right to in the future, subject to the approval of any authorities having jurisdiction of the liquor control laws, to purchase the said cocktail lounge business, including the said license, the inventory and good will, at any time during the initial term of the lease of the bowling premises, and all

[3286]

additional terms, from owner to Brunswick for $50,000 plus the value of any liquor inventory. That's what it says, does it not?

A. Yes, sir.

Q. And if these conditions come about, Brunswick may, may it not, for $50,000, plus the value of any liquor inventory, obtain the cocktail lounge at Rahway, isn't that so?

A. Yes, sir.

Q. Thank you.

Now, sir, in what sense of the word can this be referred to as a management contract, or a management arrangement, this lease?

A. In what sense?

Q. Yes.

A. You are asking my opinion?

Q. No, I am asking—well, let me ask first: Can this, in your opinion, with some experience in this business, can this agreement be referred to sensibly, in good faith, as a management agreement?

A. Yes, sir.

Q. Does Brunswick enter into management agreements for other bowling centers?

A. Yes, sir.

Q. And those agreements, do they contain a lease

[3287]

of the premises to Brunswick?

A. A lease of the premises; yes, sir.

Q. A lease of the real estate?

A. To Brunswick?

Q. To Brunswick or BCOD.

A. No, sir.

Q. What is this, sir, what is this in my hand, that you just looked at?

A. It's a lease.

Q. Isn't this a lease to Brunswick?

A. Yes, sir.

Q. Do you still persist in saying that this is a management agreement?

A. We have no investment in the properties. We are managing it for Mr. Schmidt, who got old, and whose son did not want to operate it.

• • •

[3293]

Q. Now, sir, I asked you about management agreements. Are these provisions normally found in management agreements?

A. I don't know what provisions you are talking about.

Q. Well, is a management agreement usually an agreement under which Brunswick pays a landlord rent and the landlord operates a cocktail center, with certain restrictions?

A. Under certain circumstances the landlord would operate the cocktail lounge. And we have another one here, Lido, that is exactly that way. And we are going to dispose of it, because it has interfered with the

[3294]

operation.

Q. Did you send out a letter to Lido?

A. No, sir; because we didn't have an option there, to my knowledge.

Q. Then it is not exactly the same, is it?

A. We didn't have an option to buy.

Q. So that is different, isn't it, significantly different?

A. I think so.

Q. Now, sir, do you call this, in normal terms, used by you and others in the bowling business, a management contract?

A. In my opinion; yes, sir.

Q. What about this Brunswick form? It says on top Brunswick Bowling Establishment Lease. Are we to disregard that and read, instead of it, "Brunswick Management Contract"?

A. You can read it any way you want. It says the——

Q. Does it say anything about it being a management contract in the whole document?

A. I would doubt that it does. But, in my opinion, based on what little knowledge I have of this situation, this is being managed for Mr. Schmidt.

• • •

[3310]

Q. Is there any particular reason that you had for singling out what it was you wanted to have terminated; was there any particular reason for terminating what you think you terminated by that letter?

A. Yes, sir.

Q. "Yes, sir"? Is that your answer?

A. Yes.

Q. What was that reason?

A. To stay within our policy, that we were not going to buy any centers.

[3311]

Q. You were not going to buy any centers; is that right?

A. That's right.

Q. Your policy, what policy are you referring to, the policy you described before?

A. We have had that as a policy, that we would not buy centers, and we just live by it.

Q. Did you have that as one of the 14 points, do you know?

A. I think it is part of it. I would have to read them to do it, but I know we have had that policy.

We have lived by it, and we intend to continue to live by it.

Q. Let me read to you one of the 14 points, perhaps this is what you have in mind.

Number 5, "Brunswick Corporation should not acquire any existing bowling establishment otherwise than through the necessity of repossessing pinsetters or alleys unless it should appear that such establishment had become a failing business and that the operator had requested Brunswick to take it over."

That's Number 5.

Is that the policy provision that you think relates to this Rahway matter?

A. Well, that's where I testified to that Rahway

[3312]

matter on the direct examination, sir, that we had a policy that we would not buy centers, we have lived by it, and it is as firmly in my mind as anything I do.

Q. Well, you took a lease for how many years—do you know how long this lease runs?

A. No.

Q. Well, if I supplied the information that it starts on the 16th of July 1970 and ends the 15th of July 1977, does that serve to refresh your recollection?

A. Doesn't refresh it.

Q. You are sure that's correct, aren't you?

A. Yes, I am satisfied that's correct.

Q. And there are also provisions in here for renewal, are there not, for renewal of the lease beyond July 1977?

A. I would presume it is. Most leases we sign are.

Q. And in the center at Rahway you testified earlier there were AMF machines, is that right, pinsetters, lanes?

A. I think there is.

Q. Number 5, "Brunswick Corporation should not acquire any existing bowling establishment otherwise than through the necessity of repossessing pinsetters or alleys."

[3313]

Sir, did you have any need to or necessity to repossess pinsetters in an AMF equipped center?

A. No, sir.

Q. When you took a lease, and you still have a lease, you acquired, did you not, the existing bowling establishment which was known as Rahway Recreation Center?

A. No, sir.

Q. You didn't acquire it; is that your testimony?

A. No, we are leasing it.

We own nothing in there.

Q. Acquiring means to you only to purchase; is that what you're saying?

A. My interpretation of it is. We are operating the center for a man who requested us to, and he wanted a firm income.

Q. And consistent with the 14 points you could go around the country picking up leases on AMF centers; is that right?

A. That depends on the situation, we could, yes.

Q. You are not acquiring them; is that right?

A. Yes, sir.

Q. Do you know whether the lawyer who wrote these 14 points was writing into No. 5 some provision

[3314]

of law that prohibited you from acquiring centers?

A. I'd suggest you talk to Mr. Seeley, he wrote those 14 points.

Q. I asked you whether you know.

A. Mr. Seeley—

Q. I am not really here to hear your suggestions, I am here to hear your testimony, if I may say so.

Would you please answer my question?

A. Mr. Seeley wrote, I don't know, I'm not a lawyer.

Q. You follow these things, don't you?

A. He wrote them.

Q. You reverse your lawyers when you think they make mistakes, don't you?

A. No, sir. Reverse them?

Q. No?

A. In the law?

Q. They made a mistake here on the option, didn't they, your own lawyer who wrote his initials down made that mistake; didn't he, and he reversed him, didn't you?

A. That's not the law, sir.

He made an error not following policy, that's correct, sir.

Q. Now, that policy—

A. We corrected it.

[3315]

Q. That policy was a policy that had to do with the application of these 14 points, that's what I understood; is that right?

A. I said that basically our policy is not to purchase bowling centers.

Q. Has that got something to do with the law; is that the reason?

A. I don't know. We made that as a policy early in the game, and we have lived by it.

Q. Policy is not the purchase of bowling centers?

A. That's right.

Q. Have you any policy against acquiring leases on bowling centers?

A. No, sir.

• • •

[3318]

Q. What caused you to do that on April 12, 1973?

A. It had come to my attention, sir, I knew it was against our policies and contrary to what I wanted in operating this business, and I had it done immediately.

Q. It came to your attention the day after Mr. Barron testified about it, came to your attention after Mr. McNeill referred to the Rahway lease as a management contract, and those facts had nothing to do with your decision to write this letter?

A. No, sir, they did not. They had never influenced me.

• • •

[3381]

Q. Now, Mr. Rudo, would you be good enough to look at number 313. You will find a center called Ronnell Bowl, Sylmar, California?

A. Yes, sir.

Q. That was a loser, wasn't it?

A. Yes.

Q. 25,000 more in 1966, 34,000 some in 1967, 53,000 some in 1968, 36,000 some in 1969, 56,541 in 1970, and 17,186 in 1971, and then it disappears from the chart; is that right?

A. Yes.

The Court: What lanes are you referring to?

Mr. Hoffmann: Ronnell Bowl, number 313, your

[3382]

Honor.

The Court: I have got the bowl, I have got the number here, but the figures——

Mr. Hoffmann: I am reading from plaintiffs' 47, which is a profit and loss.

The Court: All right.

A. I am reading from cash flow. I have got the wrong number.

Q. It is also a loser on cash flow, is it not?

A. Yes.

Q. Would you be good enough to take a look at that Ronnell Bowl entry just to make sure that your testimony is clear.

They lost in the figures I gave for each year, 1966 to 1971, did it not?

A. Yes.

Q. Okay. Now, was Ronnell Bowl one of the centers which you sold?

A. Yes.

Q. Do you know who the purchaser was?

A. Yes, sir.

Q. What was his name?

A. Novack.

Q. Do you have any knowledge of why Mr. Novack was prepared to buy this center which had so con-

[3383]

sistently developed a loss over the years?

A. I was not in any part of the deal, sir.

Q. But do you know anything about it?

A. No.

Q. Do you know anything about an earthquake in California in the year of our Lord 1971?

A. Yes, sir.

The Court: Can we have the year without the Lord?

Mr. Hoffmann: Anno domino, A.D.

The Court: Yes.

Q. That earthquake, did you know of any impact it had on Mr. Novack?

A. Yes.

The Court: What was the impact? Are you talking about the earthquake?

Mr. Hoffmann: Yes, sir. That's exactly what I want to know. Exactly what I want to know.

Q. What is it, if you can tell us?

A. He lost his bowling center.

Q. Ah, he lost his bowling center because of the earthquake; isn't that right?

A. That's what I understand.

Q. And that center was nearby to Ronnell Bowl,

[3384]

wasn't it?

A. Yes.

Q. And he had a going business with leagues and bowlers and an earthquake came along and wiped him out; isn't that so?

A. Yes.

Q. And he looks around for a center and what did he find, he found your loser, did he not?

A. Yes.

Q. Do you know what he paid for it?

A. I told you yesterday——

Q. Do you remember today?

A. Yes, sir, I will tell you he bought the lanes, I don't know the price, he leased the pinsetters with option to buy, he had since spent $80,000 in modernizing and put scorers in there. That's all I know, sir.

• •

[3386]

Q. The 14 points require, do they not, that you should reacquire pinsetters under very special circumstances, you should reacquire pinsetters where you thought you could rehabilitate the centers, and where you could sell them off, isn't that right, to suitable customers when they became going businesses? That's not the exact words, but that's the sense of it, is it not, Mr. Rudo?

• • •

[3387]

A. Yes, sir.

Q. Did your lawyers at any time, in the 14 points or anywhere else, give their blessing to Brunswick leasing bowling centers at different points in the United States?

A. Yes, sir.

Q. Is that advice given by lawyers embodied in any piece of paper that you know of?

A. No, sir.

Q. Was that advice given to you, that it was lawful to do that?

A. Yes, sir.

Q. Did you ask, in respect of Rahway Lanes, whether or not it is a proper thing, under the law, for you to take a lease on Rahway?

A. I didn't specifically on Rahway, but once the policy was cleared by Legal, my people worked with the legal department on each and every one of these.

Q. When did it happen that the policy was cleared?

A. Before the first lease, whenever that was.

Q. Do you know what that lease was?

A. No, sir; I don't remember.

Q. In connection with Gladstone Bowl, did you have that matter cleared by lawyers, the question of

[3388]

taking a lease there, did you have that cleared by lawyers?

A. Yes, sir.

Q. Separately from the others, from the policy?

A. I told you, sir, when we formed the policy, and our legal department approved it earlier, my operating people handled each of these with the lawyers. I don't go each time and find out.

Q. Did the lawyers tell you that they now had a new point to add to the 14 points as to how Brunswick should conduct itself with relation to leases?

A. No, sir.

Q. Do you understand what it is to acquire something; does that word have a meaning for you, to acquire?

A. It does to me; yes, sir.

Q. What is the meaning of "acquire"?

A. Possession, own.

Q. Now, if you have possession of a bowling center, lawfully, someone has leased it to you, under the definition you have just given us, you have acquired it, the bowling center, at least for the time of the lease, isn't that so?

A. No, sir.

Q. You just said possession.

[3389]

A. I said possession and own.

Q. To acquire something you must buy it?

A. In my opinion, it is.

Q. It is not enough to enjoy it, to use it, lawfully?

A. I am telling you what my interpretation is.

Q. Yes, I am trying to—

A. You are trying to change it.

Q. No, I am just trying to fully understand it. You say "acquire" means own?

A. Yes, sir.

Q. And so when, in point number 5 of the 14 points, the lawyers say Brunswick Corporation should not acquire any existing bowling establishments otherwise than through the necessity of repossessing pinsetters or alleys, unless it should appear that such establishment had become a failing business, and that the operator had requested Brunswick to take it over, you say that does not apply to leases, at least for the reason that you don't acquire it unless you buy, is that right?

A. I am saying that our leases, which I feel are management contracts—does not apply and does not violate 5.

• • •

[3392]

operation of that center.

Q. Does he have, do you know, under his contract any right to be involved, unless you want to let him do it—does he have any right under his contract to be involved in the bowling operations at Rahway?

A. I don't know. I have never read, as I said to you, every word in it. But I think he does. And if I had that much invested I would protect it, if I were in his shoes.

Q. Are you still saying here and now, 12:25 on this day of April 25, that you still haven't read this Rahway—

A. I have not.

Q. Nothing that has happened in this courtroom in the last few days has provoked enough interest in you to read it; is that what you are saying?

A. I am satisfied.

Q. You went out to Chicago, you wrote letters about it, and don't read it; and you found that your lawyer out in Chicago let a big error slip by; you said—

A. I don't think it was such a big error, because it was only an option. I don't think it was a big error. It was an option we never intended. It was a mistake, by putting it in, in the first place.

[3393]

Q. You mean it was a mistake in judgment. It didn't happen by chance.

A. It was a potential mistake. It was not a mistake. It was a potential mistake, because it was an option to buy, which we had the right to exercise or not. And we never intended to exercise it.

[3394]

Q. Just a moment, if I may. You have an option to buy. Does the option hurt anybody; does it damage anybody? It sits there in your lease, an option to buy, isn't that right?

A. Yes.

Q. It is there.

A. Yes.

Q. And the lease will expire in due time, and if you don't want to buy, you don't have to, is that right?

A. That is correct.

Q. How does it damage you in any way that it is there?

A. It doesn't.

Q. What is your objection to it? Why should you suddenly, in the midst of this trial, go to Chicago, write a

letter and say, "I don't want the option," are there reasons for that?

A. Yes, because it violated our basic policy of not ever purchasing bowling centers and I wanted it in none of our records, potentially or otherwise.

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[3397]

Q. Now, sir, in connection with the 14 points, are those 14 points still in effect in the operation of Brunswick affairs?

A. As I testified, yes, sir, basically. They are good business philosophy, generally.

Q. Have there been any changes in the 14 points, as far as the present operations of Brunswick are concerned?

A. There have been those that I noted the other day. And there could be some additions that we never added to the 14 points. But basically, we follow the 14 points; yes, sir.

Q. Did you say the other day in what respect the 14 points have been modified?

A. I recall that we testified on some of them. I did cover that.

Q. Can you just briefly jog them off for us now, what the new departures are from the 14 points, what the changes are?

[3398]

A. I can't, all of them; no, sir.

I can tell you basically that on one and two there have been changes from the original because of some IRS regulations which our Accounting Department told us to change.

And that is what I think I stated the other day. My other comments I don't remember specifically. You have the transcript. You probably—

Q. When you acquired a bowling center—by, "you," I mean Brunswick, not you personally, of course—when Brunswick acquired a bowling center, Mr. Rudo, is it your testimony that an evaluation report was made?

A. When Brunswick acquired a bowling center?

Q. Yes.

A. Yes, sir.

Q. And was this evaluation report designed to indicate to Brunswick whether or not it would be desirable for Brunswick to operate the center as a bowling center, as distinct from merely foreclosing and repossessing automatic pinsetting machines and lanes?

A. It had nothing to do with repossessing. The only purpose of the evaluation was to advise the operating group the potential of that bowling center.

Q. At what point in time are you talking about

[3399]

in the history of a bowling center that is being acquired?

A. I am talking about '65, '66, '67.

Q. I don't mean that.

Come with me along this road, if you will. Brunswick finds that the Jones center in Peoria, Illinois, is deeply in debt to it, it owes money to Brunswick for its pinsetters and lanes; at this moment somebody decides, does he not, considers the question and decides whether or not there should be a foreclosure, whether or not the machines should be repossessed, is that correct?

A. Yes, sir.

Q. Where is that done?

A. In the Installment Credit Department and in the Legal Department.

Q. Is that done before there is an evaluation report made as to the center itself?

A. In most cases it was done that way; yes, sir. There could have been cases, when it looked bad, and an evaluation report could have been made.

The decision usually had been made.

Q. You mean the decision had been made to foreclose?

A. Yes, sir; to repossess.

Q. To repossess. Now, you decide to repossess from Jones center in Peoria; somebody in Brunswick

[3400]

says, "Maybe it would be a good idea for us to operate that center," is that right?

A. Yes, sir.

Q. Is that done before or after an evaluation report is made?

A. The decision to operate?

Q. Yes, the decision; does that follow on an evaluation report as to the center?

A. It follows after you get an evaluation report.

Q. What causes an evaluation report to be made? You decide to foreclose, if I understand your testimony correctly, to repossess the equipment.

A. In '65 and '66 and '67, when this was very prevalent, that is what occurred. The Credit Department made that decision, that they were going to foreclose. And the Legal Department, because it was a hopeless case, and they couldn't collect, they usually advised our evaluation group, who went out immediately to evaluate the center.

Q. The evaluation was made as a matter of routine whenever you repossessed it?

A. Yes, sir; as far as I can remember.

Q. So, first you decide then, you are going to repossess, and then you send out an evaluation team; for what purpose?

[3401]

A. To see if this bowling center has a potential to be operated.

Q. And by a potential, do you mean a potential to make money?

A. Yes, sir.

Q. And that would be, of course, to make money for Brunswick, would it not?

A. Yes, sir.

Q. And after an evaluation report is made, someone makes a decision, isn't that so, as to whether or not the center should be operated?

A. Yes, sir.

Q. Who is that someone?

A. It was not one. It would stem to me finally. I had the power to do it or not to do it. But I usually had a committee that worked with me. And we discussed all aspects of it.

The project leader, who made the evaluation, would give us a presentation of the situation and we would arrive at a decision. We would look at maps, lots of things.

Q. Would you consider the matter of population to lane in making that decision?

A. We would consider population, yes, sir.

Q. Population to lanes?

A. Not necessarily.

[3402]

Q. How many people there were in the community, their relationship to the number of people and the number of lanes in the area, was that considered?

A. Yes, sir.

Q. That was a standard part of the evaluation report, was it not?

A. Not that I recall; no, sir. But it could be. It would be mentioned in many cases; yes, sir.

Q. And would it not be mentioned in terms of one lane to so many people?

A. In many cases; yes, sir.

Q. Was that the formula, one lane to so many, a formula which changed from center to center?

A. As I recall the evaluation, sir, they would mention that there was one lane per X number of people in this market. I know of no formula that they recommended.

Q. That was done by some process of arithmetic, wasn't it; you would find out the number of people in the area, and then the number of lanes, and perhaps divide the lanes into the number of people, would that be right?

A. Yes, I would guess so.

Q. And you would come out with a number like 1 to 1,000, or 1 to 1500, something like that, or less,

[3403]

perhaps, is that right?

A. Yes, sir.

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[3408]

Q. Let me ask you this, sir: At any time did Brunswick in its calculation have what might be called a rule of thumb as to what is a healthy relationship between population and number of bowling lanes?

By "healthy" I mean, of course, in economic terms.

A. When I first came with Brunswick, sir, I told you that I worked with, in the early 40's, with some people, one of them being my father who had managed a branch for Brunswick, and at that time he used one per thousand, and that has been around the industry for a long time, but I have not considered it any differently than I would the

other points, and it would be considered, that you would consider in evaluating a location.

Q. Now, sir, excuse me just a minute——

[3409]

this policy of Brunswick as to operating bowling centers for salvage purposes, that's a fair summary of the policy, that they operate for salvage, that is to say, to try and get the debt out of it, and then they will sell it to interested purchasers?

A. That's not our policy, and I have never seen it stated the way you just stated it.

Q. That's not your policy?

A. Not the way you just stated it, no, sir.

Q. How would you state it?

A. Our policy, as I understand it, is to take over a bowling center, make it a profitable business and sell it as a going business.

Q. That's somehow you think different from a salvage, that's not a salvage policy; is that what you're saying?

A. That's our policy. I didn't say it wasn't a salvage policy.

You said we were getting our debt, but we never announced that as a policy.

Q. Have you ever announced the policy that you were just going into the bowling operating business for the purpose of getting what you could from situations where people were in debt to Brunswick, and not for the purpose of permanently going into the bowling operat-

[3410]

ing business; did you ever announce a policy of that kind? whether or not I am using the exact words.

A. You are a long way from what we said, as I recall it, but I couldn't answer that yes or no.

Q. You're talking now about what you said early in the game in San Juan, are you not?

A. I don't know. Are you asking me?

Q. I am asking you simply whether this is a policy, and your answer to my question is you are a long way from what we have said; isn't that what you answered?

A. As I recall it, yes.

Q. What did you, when you said, "we said," where did you say it and when; what is the announcement of the policy you referred to?

A. The original announcement occurred in San Juan, as I recall. We told people we were going into this business, to operate them, make them profitable, and to sell them, as I recall.

Q. And to sell them; is that right?

A. Yes.

Q. Did you indicate to the operators at San Juan that you were going into this business to stay, and if you didn't sell them you'd be there as their competitors; did you indicate that to the operators?

A. We never indicated otherwise.

[3411]

Q. You never indicated otherwise?

A. As I understood your question, we never indicated that we were going to just get out, which is what I think you said, or your question was.

Q. Sir, was there any indication to the operators about your going into the bowling business by the route of building new bowling centers?

A. We told them at the time we had no plans for that?

Q. When did you change your mind about that?

A. In 1969.

Q. And where did that change of mind take place?

A. In our offices.

Q. Who was involved in the change of mind, corporate mind?

A. Me.

Q. Just you?

A. Oh, there were others I had to get permission from, but I changed it.

Q. Whom did you have to get permission from?

A. Mr. Hanigan, Chairman of the Board, I had to tell him what I planned on doing.

Q. Did you get their permission?

A. Yes.

Q. All in 1969?

A. Oh, early 1969, yes, sir.

[3412]

Q. And that was to go into the bowling business through the operation of new centers; is that what you're saying, bowling operating business?

A. Yes.

Q. Did you also get their permission to the leasing of centers built by others, Brunswick's leasing the centers?

A. As a management deal, yes.

Q. When you say, "as a management deal," are you distinguishing it from some other kind of deal?

A. When you say, "leasing centers," I construe, "centers," being fully equipped; is that what you meant?

Q. Yes.

A. Yes, sir.

Q. You got their permission?

A. Yes.

Q. Hanigan's?

A. Yes.

Q. And did you also get their permission to lease centers that had AMF equipment rather than Brunswick equipment in them?

A. As long as we were managing them, yes, for the owner.

Q. That's Rahway?

A. Yes. We have other that we have AMF equipment

[3413]

that we manage——

Q. That's an example?

A. We manage a center upstate.

Q. That's an example, is it?

A. Could be, yes.

Q. That's what you have been saying for several days from the stand.

A. Well, yes.

Q. It is a management agreement; is that right?

A. In my opinion operationally, it is.

Q. And Hanigan approved your taking a lease if you interpreted it as a management agreement on AMF equipment; is that your testimony?

A. Yes, sir.

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[3415]

Q. But the fact is that Brunswick opened how many new centers which it operates itself?

A. Seven, as I recall. I think it is seven.

Q. Now, in all those seven centers, new centers, Brunswick didn't sell any center, did it?

It didn't sell the new center?

A. We didn't sell those centers, no. We offered them to sell. We offered them for sale.

Q. Before you built them?

A. Before we built them, while we were building and

[3416]

after they were complete.

Q. You put up the centers without a customer; isn't that right.

A. Yes.

Q. I understood your testimony a moment ago to be that if there is a customer in the area, you will put it up for him, but is it also your testimony that if there is no customer you will nonetheless put up a center for Brunswick to operate?

A. If we think it has a potential, yes.

Q. That you can do anywheres you think it is appropriate, isn't that right, anywheres you want throughout the United States?

A. Yes.

Q. You find a, what looks like a good site on the side of the road anywhere in the United States, and you can put up a new center there if you like; isn't that so?

A. Yes.

Q. And without having a customer in advance ready to buy it from you; isn't that so?

A. If it has a potentional, yes.

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[3419]

CROSS-EXAMINATION (Continued).

By Mr. Hoffmann:

Q. Mr. Rudo, is it your statement that Brunswick

[3420]

has continuously until today tried to follow the 14 points in its conduct of its affairs?

A. Basically, yes. We have modified it on occasion. But we have followed it, as best we could.

Q. And whatever modifications you have made, those are the ones you testified about earlier in this proceedings; are there any other modifications?

A. There may be some. I can't recollect them right now.

Q. And may I ask you whether at any time, when Brunswick took over a bowling center and operated it through BCO, it made some effort to find out whether or not there was any other person or entity in the area who wanted itself to operate the center?

Do you understand my question?

A. No, sir. I missed the first part of it.

Mr. Hoffmann: Perhaps the reporter—

The Court: Read it back, please.
(Pending question read.)

A. Not necessarily, no.

[3421]

Q. Mr. Rudo, when Brunswick leased a center which was being operated by somebody else, can you tell us whether or not Brunswick made an effort to inquire whether or not there were other people who might want to become tenants of any such a lease?

A. I know of no case.

Q. You didn't make an effort; is that what you mean?

Now, sir, when Brunswick built a new center, did Brunswick study the area to see whether or not there existed in the area any competitors of Brunswick, that is to say, customers of Brunswick equipment who were operating bowling centers?

A. Yes, sir.

Q. And did you build any of your seven centers in an area where there was some customer of Brunswick pinsetters or lanes?

A. Yes.

Q. You did do that?

A. Yes.

Q. Then the existence of that competitor customer in that area did not serve to deter you or restrict you in any way from putting up your new center; is that right?

A. If the evaluation indicated there was room for

[3422]

it, no, sir, it did not.

Q. Mr. Rudo, on May 3, 1965, you wrote to Mr. Davis in accordance with Plaintiffs' Exhibit 63 which is in evidence that:

> "Neither the National Bowlers Proprietors' Association nor any other proprietors' association or individual proprietor have any legitimate cause for alarm or concern over operation by Brunswick Corporation of a relatively few bowling establishments."

That's your letter, is it not?

A. May I look at it?

Q. Yes, please. I show you the—

A. May I read it?

Q. Well, if you'd like, but it has nothing to do with my question.

I just asked you a single question about the letter, and I'd like to know what your answer is.

Mr. Hoffmann: Your Honor, the witness is reading the exhibit in extent, so may I ask that he be instructed in advance to answer my question, if he can, yes or no?

The Court: Yes, I so instruct him.

A. May I have the question again, please?
(Record read.)

The Court: Yes or no.

[3423]

A. As it is written there or stated—

Q. You were instructed to answer the question yes or no by the Court.

A. No, sir, because you said national association, and it says Nassau County. It is in the letter. I am trying to help you.

The Court: With the amendment?

The Witness: As Nassau County, yes.

Q. The answer is you did write as follows:

"Neither the Nassau Bowling Proprietors Association nor any other proprietors' association or individual proprietor have any legitimate cause for alarm or concern over the operation by Brunswick Corporation of a relatively few bowling establishments."

You don't challenge that?

A. I don't challenge it.

Only thing I was concerned with was you said "national," as he read it back, and I was just helping you out.

Q. Thank you, sir.

Would you give the same assurance as to the bowling proprietors' association today?

A. Of Nassau County?

Q. Yes, Nassau.

A. Definitely.

[3424]

Q. How about any other society, bowling society of proprietors, would there be some reason in the United States where you would not give them that assurance today?

A. I know of no reason.

Q. In other words, you are prepared to say even now in 1973 that the independent bowling proprietors would have no legitimate cause for alarm or concern over the operations by Brunswick Corporation of a relatively few bowling establishments?

A. Yes.

Q. But you operate many more than a relatively few today, don't you, 160?

A. It is a relatively few out of 9,000, and that's what the calculation—

Q. When you stated this when you wrote this letter, how many centers did Brunswick have?

A. I don't know the date.

Q. May 3, 1965.

A. May 3, 1965, I don't remember exactly how many we had.

50, maybe.

Q. And you were able to describe 50 as "a relatively few."

Do you describe 160 or more as a relatively few?

[3425]

A. Based on the overall market it is few, in my opinion.

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[3426]

Q. Conditions have changed, haven't they, since you wrote this letter in May 1965?

For example, did you build any new centers which you operated at that time?

A. No.

Q. Had you reached a decision about operating which you described before the recess that took place sometime in 1965?

A. No, sir.

Q. At this point in history?

A. Which point?

Q. May 3, 1965. Was it not the purpose of Brunswick to assume the operation of establishments on a salvage basis?

A. Yes, sir, as a salvage basis when we had an avalanche coming in, yes.

Q. Those are different circumstances, are they not, from what exists today?

A. I'm sorry, I didn't hear you.

Q. These are different circumstances as they existed in May 1965 from what they are today, in 1973; isn't that so?

A. Yes, sir.

[3427]

Q. Now, as to the present, as to 1973, Mr. Rudo, would you answer if a letter were written to you by a bowling proprietors' association complaining about the Brunswick operation of centers that they had no legitimate cause for alarm or concern over the operation by Brunswick Corporation of a relatively few bowling establishments?

A. In essence I would write the same thing.

I may not use the word "relatively few," but I would cite our history and how we had not hurt people, and basically I'd write the same thing.

Q. You know that you haven't hurt people; is that your testimony?

A. I feel fairly certain we haven't.

Q. And when Brunswick opened up a center or took over a center isn't it your testimony that it didn't take away business from other centers in the area? Is that your testimony?

A. No, that's not my testimony.

Q. And if it did take away business from other centers in the area, isn't that what you mean by "getting hurt"?

A. It's—

Q. Doesn't that hurt if it takes away business from other centers, doesn't that hurt the center from which

[3428]

the business had been taken away?

A. Yes, but if the center never had the business in the first place, it didn't get it taken away from it because the other center was in existence.

Q. You answered some question that you just asked yourself, because you have already answered my question, didn't you?

A. No, I didn't, I just completed it.

Mr. Hoffmann: I will ask that the last remark be stricken.

The Court: It will be stricken and the jury is instructed to ignore it.

Mr. McNeill: Your Honor, I'd like some clarification as to whether Mr. Hoffmann by "hurt" means competition?

The Court: You are not a witness, Mr. McNeill. No, overruled.
Next question.

Mr. Hoffmann: Thank you, your Honor.

Q. Now, sir, you were asked on your direct examination by Mr. McNeill—I'm sorry, you were asked by Mr. McNeill on page 2880 as follows:

"Question: You say Brunswick has never lowered the price for bowling—" and I think the point of reference we will all agree is when Brunswick was

[3429]

operating a center, taken over a center—"You say Brunswick has never lowered the price for bowling?

"Answer: To my knowledge we have never lowered the price when we took over a bowling center and started operating it. We either stayed the same or raised it."

A. Yes, sir.

Q. That answer was to your knowledge; isn't that right?

A. That's right, sir.

Q. Do you know about all of the transactions taking place in the various Brunswick-operated centers in respect, let us say, to trying to attract a league to come and bowl in the Brunswick center?

A. If it violates policy I know about it.

Q. Who tells you about it if it violates policy?

A. Well, it comes out through our accounting department, our auditors, our outside auditors, our corporate auditors, our accounting firm which—some place over a period of time it's been my experience where there are wrongdoings and violations of policy it will come out.

Basically I would say if this occurs I will know about it. League contracts are signed and registered with the accounting department, our league—many

[3430]

things that occur, and I don't know all of the details sitting here, that would give me by exception any changes.

[3431]

Q. Do you know, for example, whether or not a league has been offered some free bowling in the morning; would you know about that from your accounting records?

A. If there were a reason; yes, sir. And if it were to occur for a reason, we would take—

Q. The price would be the same; wouldn't the price be the same; wouldn't it appear on your accounting records as the same price, even though there were some free games offered if a league bowled with your center?

A. At a given moment, a league bowled and paid nothing? Is that what your question is?

Q. No, that is not my question. Please listen to it.

A Brunswick operated center offers to the league two free games of bowling during the morning, in the event that the league bowlers bowl in the Brunswick-operated center; would that circumstance reflect itself in your accounting record of the price paid to bowl?

The Court: Do you understand it?

The Witness: No, sir.

The Court: Suppose a man is given two free games.

The Witness: If he gave two free games regularly, every week, to a—

[3432]

The Court: Let's say twice a week.

The Witness: In time either we would pick it up in accounting records, through an audit, or something, if it was contrary to policy.

The Court: Are all the sheets filed with you?

The Witness: Not with me personally, no.

The Court: I mean with your company.

The Witness: Yes, sir.

The Court: The score, and the number, and everything, where they keep score on those sheets?

The Witness: Yes, sir. And there are meters on the machines. Every Brunswick center has meters on its machines, and the meter readings come through on the various reports. It would eventually be brought to my attention.

By Mr. Hoffmann:

Q. Has it been brought to your attention that a bowling center operated by Brunswick on the West Coast offers Sunday morning breakfast and three games free for $2.25, and the ad says a complete breakfast; has that been called to your attention?

A. I don't know that it is done. I have not seen anything about it.

Q. And if it exists, you don't know about it,

[3433]

is that right?

A. No. But as I said earlier, I will eventually know about it.

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[3434]

Q. Mr. Rudo, do you have any way of knowing if one of your bowling center managers says, "We will give you free use of bowling shoes if you bowl in our center"?

A. Eventually, we find out, sir. Our auditors, our shopping—I would suggest—eventually we find out; yes, sir.

Q. Now, when you do find out, what happens?

A. We take corrective action.

Q. What is corrective action?

A. It depends on the situation.

Q. Well, have you ever ordered any manager of

[3435]

a bowling center to stop cutting prices?

A. Yes, sir.

Q. When did you do that?

A. Well, when it came to my attention on a situation that was brought into the Court earlier on that aircraft deal, we changed that situation. I changed all the pricing.

And they didn't come back with it, because we wouldn't give them the special deal they requested.

Q. Do you remember what bowling center that was?

A. It was in Sunset Lanes, as I recall, in Avalon. But I know generally what transpired. If we find these things, we correct them, and we change it.

Q. How did you learn about that, here in the courtroom?

A. Mr. Dankoff has been running around the country for seven years talking about that one case.

Q. And you listened to him?

A. I have heard him,

Q. You heard him. And you changed it at Sunset?

A. No, sir; but it was the only case he ever found.

Q. How do you know that?

A. Knowing Mr. —

[3436]

Q. You just said that is the only case he ever found. How do you know that?

A. Very simply. I know Mr. Dankoff well enough to know that if he had other cases he would be talking about them.

Q. Do you know whether or not he has talked about other cases, and right here in this courtroom, and within the last couple of weeks?

A. No, sir.

Q. Do you know that?

A. No, sir.

Q. I put it to you that he did. And in face of that representation, do you want to change your testimony about Mr. Dankoff?

A. I can only tell you what I know, sir. And that's what I told you.

Q. You can also tell us what you don't know, can you not?

A. Yes, I can.

• • •

[3437]

Q. You spoke of Mr. Dankoff talking all over the country about Sunset, did you not?

A. Yes, sir.

Q. What was Mr. Dankoff's claim about Sunset, in connection with prices?

A. That we gave special consideration to a league. I know he made all kinds of allegations that I have never been able to find to be true.

Q. He made these allegations, and you said a minute ago you did something about them, is that right?

A. Yes, sir.

Q. What did you do?

A. We made sure—this was early in our operation—we made sure—and I testified to this earlier in my testimony—when it came to our attention this was early in our operation, and the next year we did not do what had been done which was different than our policy, and we lost the league.

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[3438]

Q. Can you tell us of any disciplinary action which you took in connection with the bowling center—BCO managed centers where their prices were lowered?

A. I don't know of any. So, therefore, I can't,

[3439]

where they lowered the prices.

Q. You don't know of any?

A. I don't know of any lowering the prices.

• • •

Q. Do you have any documents, letters, announcements, posters, sent to different Brunswick operated centers saying, "If you lower prices, you are going to be disciplined," or something to that effect?

A. I don't know. That's handled by the -V.P. of operations, and other people.

Q. You don't know?

A. I establish policy with him, sir.

Q. And you don't know whether there is any such thing, is that right?

A. I know that our people understand the pricing policies and that we are going to be at the high end

[3440]

of the market, and we are going to maintain those policies. This I know.

Q. You have a point among your 14 points, point 10, which Mr. McNeill read to you in the direct case.

"Inducements used to obtain leagues should not be so attractive and persistent as to imperil the business of any existing establishment."

In answer to a question of Mr. McNeill, "What has Brunswick BCO policy been with respect to this point?" you answer that, "We will not do this," that, "We will follow this policy, and we do it."

And then you were asked, "Have you adhered to the policy on that?"

And the answer is, "Yes, sir."

Now, sir, I ask you this. How do you know that this BCO policy, with respect to not making inducements so attractive and persistent as to imperil the business of any existing establishment, how do you know that it has been followed in practice?

A. The contracts are registered. We have auditors that go out and check them. We have auditors and shoppers who bowl to make sure that this is occurring. There is a weekly card that is submitted on this.

There is a daily cash report. We have as many

[3441]

checks as—in the normal course of business, that we can establish to make sure this is adhered to. We stay at the high end of the market.

I am satisfied, on my own trips around the country, and in talking with most bowling proprietors, and in most areas that I visit, that they—they have assured me they feel the same way about our operations. So I am fairly convinced, I am certainly convinced that we do do it.

Now, there may be an occasional case where a slip—as soon as we know about it, we would change it. But we operate 168 centers with about 4,000 people and I

can't account for every one of them, except as establishing policy and doing everything humanly possible to see that they follow the rules and regulations.

Q. And if there are any breaches of that policy, you can do something about it, if you know it, isn't that right?

A. Yes, sir.

Q. And do you know of any breaches of that policy?

A. I can't think of any here, but if it ever occurred, we would take action. I can't think of any here, right now; no, sir.

[3442]

Q. Well, Mr. Rudo, do you know of any disciplinary action, any warnings, or any statements which you might have made to persons within the BCO organization who didn't follow that policy?

A. Sir, I get reports every six months. I get audit reports every time they occur. And I go through this with my operating people. I do not know of any specific discipline; no, sir.

Q. Do you know any more about these inducements than you do know about the cutting of price, would you know more about one than the other?

A. I feel certain we don't cut the price, and that we don't do any inducements that are not done generally in an area.

Q. And the same limitations on your knowledge, as you testified to, as to the cutting of price, would that apply with equal force to your knowledge of special inducements?

A. That I get reports, and I check them, and we follow them; yes, sir.

[3443]

Q. Now, Mr. Rudo, on your direct examination you testified about Dutchess Lanes, did you not?

A. Generally, yes sir.

Q. And if I remember your testimony correctly, you first learned about Dutchess Lanes in 1946; is that right?

A. Yes.

Q. Didn't that have something to do with the employment you had at that time?

A. I was a salesman in Dutchess County, and Dutchess Lanes was one of my accounts.

Q. When did you last see Dutchess Lanes?

A. 1947.

Q. Who was the owner of Dutchess Lanes?

A. The Levine family.

Q. And did you have occasion to see Mrs. Levine in 1946 and '7?

A. Yes.

Q. Was she the one who was operating the center?

A. No, sir. She was there, but the primary day-to-day operation was done by her son.

Q. Was she the ostensible head?

A. She was the owner, but her son ran the bowling center.

[3444]

Q. Did you have occasion to see Mrs. Levine after 1947?

A. Yes.

Q. On many occasions?

A. Well, yes, I saw her; I don't know what you mean by "many," but a few to several time, four or five times, maybe.

Q. In 1970 you were asked the following question, "And you saw it last in 1947?

"Answer: Yes. I saw Mrs. Levine on many occasions after that."

That's so, isn't it?

A. Yes.

Q. That's your testimony, not mine.

A. Yes.

Q. Do you know when Mrs. Levine left the bowling business?

A. I am not certain when she left it. The place had a fire and then it was rebuilt, and she leased it out.

She was the landlord. I'm not certain when she left it.

Q. Do you remember anything about when it had its fire?

A. I would say it was in the late '50's or early

[3445]

'60's, I'm not sure.

Q. The late '50's or the early '60's; is that your testimony?

A. Yes. I think, I'm not sure.

Q. Did there come a time when Brunswick acquired Dutchess Lanes?

A. Yes.

Q. When was that?

A. In 1965.

Q. Do you remember whether or not there was an evaluation report made for Dutchess before the acquisition?

A. I know there was an evaluation made of Dutchess, yes.

Q. And do you know anything about that report, whether or not it indicated a favorable operation?

A. It indicated it had a potential, yes, sir, as I remember.

I haven't read it in a long time. We wouldn't have taken it over if it had not.

Q. Did the circumstances that you had seen the center and had seen Mrs. Levine many times have anything to do with the Brunswick acquisition of the center?

A. I knew Mrs. Levine, and the fact that she was an older lady, and widowed, and owned this property.

[3446]

I knew that. And the fact that this had a potential.

I would guess it may have, yes.

Q. Well, sir, did you learn anything in 1946 or 1947 which led you to believe that Dutchess had a chance to become successful?

A. In 1946 and 1947 it was a very successful bowling center.

Q. And it was then that you saw the center?

A. That's right.

Q. Now, I'd like to read you some testimony and see whether this testimony is approved by you today.

The Court: From where?

Mr. Hoffmann: From page 1473 of the 1970 proceeding, the cross-examination of Mr. Rudo at that time.

• • •

[3447]

Q. "Question: The fact that you had seen the center in 1946 had nothing whatsoever to do with the

[3448]

Brunswick decision in 1965, is that your testimony?"

The Court: Referring to Dutchess?

Mr. Hoffmann: Yes.

Q. "Answer: No, sir.

"Question: It did have something to do with it?

"Answer: I think I said that this morning.

"Question: And what was it that it had to do with?

"Answer: I knew Mrs. Levine. I knew where the bowling center had been located. She had called me during the time that we were evaluating it and I had a sentimental attachment to it because I knew the family. I felt based on what I knew in 1946, 1947, and its location, that it stood a potential chance of being successful.

"I told you also, or I told the Court this morning, that our operating people felt it had been mismanaged and I thought that because Mrs. Levine was getting older, that this was the reason that it occurred.

"Question: What did you do because of your sentimental attachment?

"Answer: The company repossessed the equipment and Brunswick commenced to operate Dutchess bowling center."

The Court: Just a minute.

[3449]

Mr. McNeill: I guess Mr. Hoffmann is not through.

That's nothing inconsistent with what Mr. Rudo said so far today.

The Court: I guess he is bringing out the sentimentality. I don't know what that has to do with credibility, very frankly, if anything.

Mr. Hoffmann: I want to see whether he still affirms the sentiment, your Honor.

The Court: Still feel bad about it, Mr. Rudo?

Q. "Question: In other words, the way you showed your sentiment to Mrs. Levine was by repossessing the equipment in her premises and Brunswick running it, is that it?

"Answer: Not alone, no sir. I told you that I thought the location was good. I remembered it from that; and that our evaluation showed that based on that projection the evaluation team showed that it would make money in the next three years. That was the real basis.

"The sentimental attachment was strictly a secondary aspect to my consideration and thinking."

A. I think——

Q. Would you like to change your testimony in

[3450]

any way?

A. Except I don't think you brought out everything. She was still the landlord, she would still get some income, and that was an important consideration of our sentimentality.

I would not change anything else. I don't know whether you heard me.

Q. You said she would be the landlord?

A. Yes, sir.

Q. Of what?

A. Of the building. We would lease the building from her, we repossessed the bowling lanes and equipment.

Mrs. Levine at that time was well over seventy years old.

The Court: Good bowler?

The Witness: At one time she was. Her son and——

Q. Are you saying, are you affirming your testimony that because she was well over seventy years of age you felt a sentimental attachment, and therefore, repossessed the equipment; is that what you are saying?

A. I didn't say anything like that, sir.

Q. But you did say that in 1970, didn't you,

[3451]

you said it wasn't a primary consideration?

A. You read what I said. I don't think it is necessary to repeat it.

Q. Well, what I read——

A. I don't deny it.

• • •

[3457]

Q. Do you regard Bowlmore as a significant competitor to Brunswick in the sale of automatic pinsetting equipment?

A. I regard them as a competitor.

Q. In the United States?

A. I regard them as a competitor.

[3458]

Q. Is it a significant competitor, a sizeable competitor?

A. I can't answer that directly.

Not particularly, no.

Q. In fact, there is only one sizeable competitor, is there not, in automatic pinsetting equipment in the United States?

A. No, sir.

Q. There is more than one?

A. I think——

Q. Who is your biggest one?

A. I think the used equipment market is the biggest competitor.

Q. I'm talking about the new——

A. AMF. I was only talking about competition for bowling pinsetters on today's market, and over the last seven years the used equipment market is by far the biggest competitor, by far.

Q. Referring again to the new equipment, automatic pinsetters, is Bowlmore a significant competitor in new bowling equipment?

A. There hasn't been a new bowling equipment market since 1963.

Q. Brunswick doesn't sell any now?

A. Very few.

[3459]

Q. Didn't sell any in 1972?

A. Sold some, yes, 1972.

Q. How many, do you know?

A. Well, I can't tell you specifically domestically, because some of our production here went to Japan.

Q. You can't break out the domestic from the Japanese?

A. Not without seeing figures, I could find out quickly.

Q. You don't know offhand?

A. No, I see a lot of figures.

Q. It is an important part of Brunswick's business today, is it not?

A. Yes.

Q. So it couldn't have been just a handful?

A. It was not a handful in 1972, it was a good sized business in the United States.

Q. Thousands of pinsetters?

A. No, not thousands.

Q. Hundreds of pinsetters?

A. Yes.

Q. High hundreds?

A. Yes.

Q. Could be a thousand?

A. I'm not sure domestically.

[3460]

Q. Could be, though?

A. I said high hundreds, could have been 990.

Q. Could have been 1,000, too.

A. I am not going to guess any more than I have. I have done as best as I can.

Q. How many do you figure for Bowlmore in 1972?

A. I said to you they are not as significant an amount. I said that earlier.

Q. So the ony significant one in new automatic pinsetters is AMF; isn't that right?

A. Today?

Q. Yes.

A. Yes, sir.

Q. Now, addressing yourself to used automatic pinsetters, do you have any knowledge of what the percentage is of the total number of used pinsetters are for Brunswick; in other words, if we had 100 used automatic pinsetters for sale in the United States, used, how many of the 100 roughly would be Brunswick?

Mr. McNeill: May I have a clarification of the question as to whether you mean originally made, originally manufactured by Brunswick, or still in Brunswick's hands?

Mr. Hoffmann: What Brunswick made.

A. I have no way of knowing.

[3461]

Q. Would it be roughly 50 percent?

A. I don't know.

Q. When you say you have no way of knowing, do you know over the years whether or not Brunswick didn't make roughly 50 percent of the automatic pinsetters that were made and sold in the United States?

A. I so testified to that.

Q. How about AMF, about what percentage?

A. Between us, we had about—I'd say, 96 percent of the market, and it—maybe Bowlmore had three to four percent.

Q. Isn't the same thing true of the used equipment that's offered for sale?

A. Not necessarily.

Q. I'm asking you about what percentage of that equipment would be of Brunswick make?

A. All I can tell you, sir——

Q. Can you answer that question?

A. No, sir, I can't.

Q. Can you tell me about what percentage of the used equipment available in the United States is of AMF's manufacture?

A. I cannot.

Q. Do you have any reason to suppose that it is any different from the- roughly 96 percent which you

[3462]

ascribed to machines that have been made in the past in the United States, you said 96 percent were either made by Brunswick or AMF?

A. I would guess that there is much less AMF used pinsetters—have been on the market than Brunswick, much less.

Q. Than Brunswick?

A. Oh, yes, sir, on the used market.

Q. I understand.

Now, sir, in connection with Pueblo, Colorado, you testified about a center, Belmont, did you not?

A. Yes, sir.

Q. That came into the hands of Brunswick; is that right?

A. Yes.

Q. I address your attention to plaintiffs' Exhibit 6 in evidence, a letter from Mr. Thomas to Mr. Cebbin——

A. Who?

Q. I think it is C, or maybe G-E-B-B-E-N, R. M. Gebben; does that name ring a bell?

A. Yes.

Q. Is it Gebben?

A. Mr. Gebben, with a G.

Q. Who is Mr. Gebben?

[3463]

A. He used to be our regional sales manager out of St. Louis.

Q. This is a letter dated June 2, 1961.

You were connected with the Brunswick organization at that time in 1961, were you not?

A. Yes.

Q. What were the nature of your responsibilities then?

A. I was vice-president of marketing at that time of the Bowling Division.

Q. Would you be kind enough to note that there is a copy of this letter indicated as having been sent to you?

A. Is that all I have to note?

Q. That's all you have to note.

A. Yes, sir, I note that.

Q. Now, this letter says—by the way, who was Mr. Thomas at that time; what was his function at that time, June 2, 1961, if you remember?

A. He was national sales manager.

Q. "After careful consideration of all of the facts involved in the Pueblo location that you outlined in your letter of May 29, home office has decided that if the contract is submitted to Brunswick, it will be rejected. The reason for this decision is that we feel

[3464]

the economy in Pueblo cannot support an additional 24 lanes at this time.

"In the event that the contract has already been signed by the time you receive this letter will you and Art Covert inform the customer of our decision?"

Do you know anything about the transaction which this memorandum relates?

A. I testified that we turned it down. I made a decision to reject it based on Mr. Lieblich's difficulty in his first season in opening—I don't know what was in Mr. Thomas' mind on it. As far as I know we rejected it, and we hoped, and I later sent Mr. Blanks out there to discourage the people——

Q. The reason for rejecting it ascribed by Mr. Thomas is that, "We feel the economy in Pueblo cannot support an additional 24 lanes at this time;" is that right?

A. I indicated in my—Mr. Gebben didn't agree with Mr. Thomas, I can assure you of that. I have testified to this. I see no problem on that.

Q. You agree with Mr. Thomas, don't you?

A. I didn't say that.

Q. Didn't you just say—

A. I didn't say that. I said we did reject it, yes.

Q. And for the reason——

[3465]

A. That's Mr. Thomas' thinking.

Q. What was your opinion in 1961?

A. My thinking at that time was because Mr. Lieblich had had so much trouble and if it were possible, we had sent Mr. Blanks out there to discourage him from going in, the surveys indicated it could go.

Q. You mean the surveys indicated that you could put in another 24 lanes at that time, and Mr. Thomas wasn't telling the truth; is that what you're saying?

A. Surveys indicated, we later had conflicting reports, and then we decided to hold off and discourage Mr. Bonforte, which we tried.

Q. Mr. Thomas said in words which I hope are clear, "The reason for this decision is that we feel the economy in Pueblo cannot support an additional 24 lanes at this time."

A. Nothing wrong with that. I agree with him. Mr. Lieblich had not done as well. I testified to this.

Q. You agree with him?

A. No disagreement at that point.

Q. Very good.

Did there come a time when the economy of Pueblo in your opinion could support an additional 24 lanes?

[3466]

A. Our people in the Spring of 1962, they went out and worked on the Pueblo Bowl-O-Mat establishment, felt there was a potential for a lot of additional business that was not occurring.

The only reason we took Belmont and I testified to this at this trial, was because of Mr. Lieblich's actions on going to AMF, going to Brunswick, and our Legal Department recommended that we take Mr. Bonforte's deal.

The Court: Let's take a five-minute recess.

[3467]

(After recess.)

The Court: All right.

Mr. Hoffmann: Your Honor, may I have the last question read?

The Court: Yes. Have Mr. Sokol read it back.

(Record read by the reporter.)

The Court: All right. Thank you.

By Mr. Hoffmann:

Q. So does it follow from what you just said, Mr. Rudo, that notwithstanding the fact that Mr. Thomas and you felt that the economy couldn't sustain another bowling center, you were prepared to go ahead and sell?

A. We had reports that indicated the economy could sustain it; the evaluation did. Then we had conflicting reports. Then we sent people out there to promote. And this went over about a year and a half. There was doubt, but there was also a positive aspect.

And based on our experience, but primarily, and the main reason, was because of our legal department's advice.

Q. And was that advice given because of the antitrust laws of the United States?

A. I can't answer that. I can tell you that they felt that because of what had transpired that we would

[3468]

be better off, based on Mr. Bonforte and what transpired, to sell.

Q. You say you can't answer that. Why can't you answer it?

A. Because I don't know what their thinking was, completely. I only know——

Q. You could answer it in 1970, couldn't you?

A. I may have. But I don't remember it right now.

Q. All right. Maybe this will serve to jog your recollection. With your Honor's permission, from page 1493 of the 1970 transcript:

"Question: So notwithstanding the fact that the economy couldn't sustain another center, according to Mr. Thomas, you were prepared to go ahead and sell?

"Answer: Sir, because of the antitrust laws our lawyers felt that there was—this was more important for us. There was a decision and that we should sell it. If necessary, we could take a loss, yes, sir."

A. I said that——

Q. Is that still your testimony?

A. I would not change it now, sir.

Q. Now, sir, did you, in selling it, address yourself to the consideration that the purchaser might be himself forced to take a loss because you and Mr. Thomas believed that the economy could not sustain

[3469]

another 24-lane center?

A. I can't answer that question.
Q. Why not?
A. Because I don't understand it.
Q. You don't understand it, really?
A. Not really.

Mr. Hoffmann: Perhaps, your Honor, the reporter could read it back.

The Court: Mr. Bremer, read it back.

Mr. McNeill: Prior to Mr. Bremer reading it back, I suggest that the question is confusing because it puts in juxtaposition two different time periods. The witness has said that in 1961, June of '61, he and Mr. Thomas agreed about a certain situation. The contract wasn't signed until May of 1962, a year later. And Mr. Hoffmann is trying to juggle those two different time periods into one question.

The Court: Let's hear the question again.

(The question was read as follows:

"Question: Now, sir, did you, in selling it, address yourself to the consideration that the purchaser might be himself forced to take a loss because you and Mr. Thomas believed that the economy could not sustain another 24-lane center?")

[3470]

The Court: Do you understand that or no?

The Witness: No, sir. It gets confusing in time. In '61 we felt this way. In '62 our promotion men were able to increase business. Mr. Bonforte felt this would be successful. He had a tremendous investment. He felt the economy—and based on what we learned in '62, I would guess that it could take it.

The Court: When did you take over Belmont, meaning Brunswick?

The Witness: '65.

By Mr. Hoffmann:

Q. Mr. Rudo, do you know of anything that happened in the year between Mr. Thomas' letter of 1961 and the sale of the center in 1962 which would affect the bowling operations of Pueblo one way or the other?

A. Yes, sir.

Q. What was that?

A. Well, Mr. Bonforte, after we had told Mr. Lieblich in early '61 that we were not going to take the deal, or in that time, called us in October or November, talked to many of our people. He knew of Mr. Leiblich going to AMF and getting them to write a letter that they were not going to take the deal. He knew that we

[3471]

had turned the deal down. So that occurred.

In addition to that, we sent people in to Pueblo who tried to—who increased the business at Pueblo Bowl-O-Mat. And there were many things that happened in that time.

Q. Did the population expand in Pueblo during that period, 1961 to '2?

A. I don't know.

Q. Did the general wealth of the community appreciably increase, do you know, during that period, 1961 and '62?

A. I don't know.

Q. Did interest in bowling increase in that period, 1961-62, in the Pueblo, Colorado, area, if you know?

A. Yes, sir; based on our——

Q. You do know that?

A. Yes, sir.

Q. How do you know that?

A. Because we had promotion people in Pueblo Bowl-O-Mat. They promoted many additional leagues. And they were satisfied that they——

Q. Excuse me. Did you have promotional people in Pueblo in 1965, and '6, and '7, and '8, and '9?

A. I don't know.

[3472]

Q. You don't know?

A. No.

Q. Well, you did know of '61 and '62?

A. I know we sent them out there in the spring of '62 for Mr. Lieblich, specifically to help his business. I know this. We had Mr. Kelly out there——

Q. Did they make Mr. Lieblich's business a profitable business as a result of——

A. They spent almost three months there. They increased his business.

Q. Did they make a positive cash flow out of it?

A. I never saw his—I don't remember seeing his statement. I don't know whether they did. I know that they felt that this business could be improved in that time.

Q. Do you know when you took the order from Bonforte?

A. Sometime in the spring of '62.

Q. Do you know when these promotional efforts were made?

A. Yes, sir.

Q. When was that?

A. In January, February, March, April, May, in that vicinity.

[3473]

Q. In the spring of '62?

A. Yes, sir.

Q. Do you know whether they came before or after you took the order from Bonforte?

A. I don't know.

Q. You don't.

A. I don't remember.

Q. If they didn't come until afterwards, then all you said about this 1961-62 change is wrong, isn't it?

A. No, sir.

[3474]

Q. Well, you attributed an improvement in bowling during that period to the promotional efforts of your people prior to the sale to Bonforte?

A. Our people confirmed that you could increase bowling in the Pueblo Bowl-O-Mat. Mr. Lieblich maintained he could not. We proved that to him. I was satisfied that more bowling promotion could help that town.

Again I repeat to you, sir, the primary reason we sold Belmont Bowl-O-Mat—Belmont Bowl—was because of the activities and our legal department's opinion.

Q. Do you want to change your testimony of 1970 when you said, "Sir, because of the antitrust laws our lawyers felt that there was—this was more important for us. There was a decision and that we should sell it. If necessary, we could take a loss, yes, sir"?

Is that still your testimony?

A. I would not change it one iota.

Q. In selling the center to Bonforte, if I understand your testimony of 1970 correctly, you were doing it because of the lawyers' advice about the antitrust laws, isn't that so?

A. I'm sorry, I didn't hear you. You were facing

[3475]

the other way.

Q. You were doing it, in selling to Bonforte—you, that is, Brunswick, were doing it because of your lawyers' advice about the antitrust laws, isn't that what you said?

A. Yes, sir.

Q. What in the world has that got to do with the 1962 promotional efforts which you have just told us about?

A. Because you, sir, said that the economy was bad, and I was trying to show to you that there was a potential in Pueblo, based on sending promotion men there and achieving results.

Q. Did there come a time when Brunswick itself acquired Belmont?

A. Yes, sir.

Q. And when was that?

A. '65.

Q. And was the economy good enough in 1965 for Brunswick to operate in Belmont, with all its experience?

A. We had no experience in operating bowling centers in '65.

Q. You didn't? I thought your first one was in '64, December.

[3476]

A. In December. And we took Pueblo over, as I remember, early in '65. We had very little experience.

Q. You were Number 1 in bowling, weren't you?

The Court: Belmont?

The Witness: Belmont; yes, sir.

The Court: You said Pueblo.

The Witness: I meant Belmont in Pueblo.

Q. You were Number 1 in bowling, weren't you; isn't that the way you were referred to in '65?

A. That refers to the sale of merchandise.

Q. You had been in the bowling business for how long?

A. In 1965? About 80 years. But never operating bowling centers to the extent we were involved.

Q. Are you sure that Brunswick never operated bowling centers during that period?

A. That's not what I said. I said never to the extent which we were then in '65 involved.

Q. But you had some experience in operating bowling centers, had you not?

A. Not as people who were then doing the job. In 1938, '39, Brunswick operated 12 to 14 bowling centers.

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[3491]

CROSS-EXAMINATION (Continued).

By Mr. Hoffmann:

Q. Just before the recess yesterday, you testified, if you remember, concerning Belmont Lanes, Mr. Rudo, and that when Brunswick started to operate Belmont Lanes you thought that something had been done

[3492]

to improve business by the promotional activities of Brunswick; is that correct?

Is that a fair statement about your testimony?

A. Promotional activities——

Q. Promotional.

A. Yes, sir, for National Bowl-O-Mat, National Bowl-O-Mat's Pueblo bowling center is where the promotion was done.

Q. Wasn't that promotion for the benefit of all bowling in Belmont—I mean in Pueblo?

A. No, sir.

Q. Just for the Bowl-O-Mat center?

A. Yes, if I remember it, that's what it was done for, primarily for that.

Q. Are you aware, Mr. Rudo, of the circumstance that there is an exhibit in evidence here, plaintiffs' 8 which shows that Pueblo Bowl-O-Mat consistently lost money from the year 1961 when it opened right through 1972?

A. No, sir, I am not aware of it.

Q. I show you P-8, if you'd like. Is this news to you that Pueblo Bowl-O-Mat was a losing operation?

A. I don't remember actually knowing about the profit

[3493]

and loss—what the profit and loss statement said. I knew that, as I think I indicated yesterday, that Mr. Lieblich—that bowling center had not done as well as had been anticipated.

Q. Now, what about the Belmont Lanes when Brunswick took it over, did that become a profitable center?

A. I had a cash flow, as I recall, in the first or second years, and then it had a minor cash flow for two or three years, and then it's been profitable, I think, ever since but it is somewhat in that—along those lines.

Q. Well, sir, in terms of profit and loss, Belmont Lanes according to Exhibit 47 lost in 1965, lost in 1966, and in 1967 showed a profit of $1264, then lost again in 1968, 1969 and 1970, and by 1970, it was—in 1969 it was $21,820, in 1970 the loss was $20,213. Mr. Rudo, is there anything in this picture of Belmont Lanes profit and loss which in

your opinion justifies Brunswick for having acquired that center in 1965?

Mr. McNeill: Your Honor, I think to be fair to the witness, he ought to at least have the benefit of having that exhibit in front of him.

[3494]

Mr. Hoffmann: I was about to hand it to him.

A. May I see the cash flow also. The cash flow would justify us keeping it in operation if it had a profit and loss.

And as I recall, it did have a positive cash flow in its early years and then had losses and then was profitable or it had cash flow positive in, I think, I know in 1971, 1972, it was profitable.

Q. Oh, yes, it wasn't even in the cash flow profitable, however, in 1965, in 1968, in 1969 and in 1970; are you aware of that?

A. Yes.

Q. So it did have a positive cash flow in two years, 1966 and 7, and then turned again in 1971 and 1972; is that right?

Do you want to see this?

A. Yes, I would.

The Court: What are you referring the witness' attention to?

Mr. Hoffmann: I am now referring to the witness plaintiffs' Exhibit 48.

The Court: What number is that?

Mr. Hoffmann: 218. I think that's page 4.

A. This is cash flow; is that right?

[3495]

Q. That's cash flow.

A. Yes, sir.

[3496]

Q. Now, sir, you were given advice by your legal department, wasn't that your testimony, in connection with the matter of selling Belmont Lanes to another proprietor?

A. This is when it was originally installed in the summer of '62, is that what you are referring to, sir?

Q. Yes.

A. Yes, sir.

Q. And just briefly, what was the character of that advice?

A. Because of the circumstances that had existed they felt we should sell it.

Q. Did you also get legal advice about Brunswick's acquiring, itself, the Belmont center?

A. Well, the criteria for acquiring centers—and in most cases the legal department sat in on our evaluation discussions—I would presume; yes, sir.

Q. Do you have any recollection of it?

A. Of that specific incident; no, sir.

Q. Do you normally receive an opinion from your legal department each time when Brunswick acquires a bowling center?

A. In most cases, but not necessarily each time.

Q. Do you recall any particular opinions received concerning the acquisition of a bowling center

[3497]

in the San Fernando Valley in California?

A. Yes, sir.

Q. What was the nature of that opinion, sir?

A. The legal department told us not to take that.

Q. And do you remember why?

A. Yes, sir; they felt that we would be better off, in that particular market, because of its size, and because of our recent acquisition of two or three bowling centers, not to take it.

Q. Did they give you any formalization of size which would make it improper for you to acquire the center in the San Fernando Valley of California?

A. No, sir; not to my recollection.

Q. Perhaps this will serve to refresh your recollection, from page 1548 of the transcript on April 9, 1970.

"Question: And did you receive an opinion from your legal department every time Brunswick acquired a bowling establishment?

"Answer: Not every time, no, sir.

"Question: And did you recall any particular opinion you may have received concerning the acquisition of bowling establishments?

"Answer: Yes, sir.

"Question: What are those?

[3498]

"Answer: It was a case in San Fernando Valley that we had repossessed many bowling centers and that we may have too many in the market, therefore, we should not, despite the fact that our evaluation showed this could be a good center, we should not operate and we did not. We pulled the equipment.

"Question: Is that because of some opinion of the legal department?

"Answer: Yes, sir.

"Question: Do I understand you to say the legal department is saying that there was overbuilding in

the San Fernando Valley and for that reason you shouldn't operate a center? Is that what you are saying?

"Answer: No, sir.

"Question: Would you say it again, please?

"Answer: I said that the legal department felt that we had repossessed a great number of bowling centers and that we were operating too large a percentage in that market in their opinion. It was about twenty-five percent, and that we should not take any more over that we had to repossess to operate. They suggested to us that instead of taking this particular bowling establishment——

"The Court: Hold it, aircraft."

Then the witness continues. "—and operating

[3499]

it; that we pull the equipment. We tried to sell this equipment. We left it in that place because the landlord, the owner of the building was most anxious to keep some tenant in there. That equipment sat in that bowling center for over a year. I think just recently has been pulled out. We have never operated it and it was on the advice of our legal department that we not do it."

Sir, having read that, does that serve to refresh your recollection?

A. Yes, sir.

Q. Now, this percentage of 25 per cent to which your lawyers referred——

A. I referred to that, sir. It was my opinion, as I understand the testimony.

Q. I read again from the bottom of page 1548 to the top of page 1549 of the transcript of April 9, 1970.

"I said that the legal department felt that we had repossessed a great number of bowling centers and that we were operating too large a percentage in that market in their opinion. It was about twenty-five percent, and that we should not take any more over that we had to repossess to operate."

Are you saying this was not the opinion of your

[3500]

legal department, but your own conclusion?

A. No, sir; I said the 25 per cent was my comment. I don't ever remember the legal department telling me that 25 per cent was—that I should not take more than 25 per cent of the market.

Q. When you said it was about 25 per cent, were you referring to the situation as it existed in the San Fernando Valley at that time?

A. That is correct, sir.

Q. And it was there that the legal department advised you that you shouldn't take on any more, isn't that right?

A. At that time; yes, sir.

Q. At that time. And had they not also advised you that you were operating too large a percentage in that market?

A. Because we had taken on three of them in a very close period of time.

Q. And it totalled 25 per cent; is that your testimony?

A. As I remember it; yes, sir.

Q. Now sir, was the opinion expressed to you that if you operated more than—say, more than 25 per cent, in here, you would be violating the antitrust laws?

[3501]

A. No, sir; not that I remember. They felt that we would be cautious by taking only 25 per cent.

[3502]

Q. Did they feel that if you did more you would create some question concerning the propriety of your action under the Anti-trust laws?

A. They felt—under the Anti-trust laws?

Q. Yes.

A. They may have had that in their mind, sir, I guess they may.

Q. Well, you didn't go ahead and operate that center in San Fernando Valley, did you?

A. No, we did not.

Q. What was the reason why you did not?

A. Because I followed the legal advice at that time and I agreed with them that we had taken over these centers very rapidly, and that we ought to at least see what we could do.

Q. Were you afraid that some consequence would develop in the event that you did take over and operate the center; was there anything that you were troubled about?

A. I was troubled that it could cause us un—unnecessary bad relationships with some of our customers is one of the reasons I was concerned, yes.

Q. That relationship with your customers, were you fearful that that relationship might not be as good if you took over this bigger piece- of the

[3503]

market; was that the nature of the fear?

A. Based on our taking them over so soon and in short order, yes, sir.

Q. Was there not also a fear that if you took over that large a percentage of the market that you would have an illegal monopoly in the market?

A. I have—I don't know—I have never been told what illegal monopoly is.

I have been told that 25 percent is not an illegal monopoly by our Legal Department.

Q. Well, was that what you were worried about, whether it was in fact a legal monopoly or not?

A. Was I?

Q. Yes.

A. No, I was more concerned with the relationships with our customers.

I am not a lawyer, sir. I don't understand all of that.

Q. Now, sir, in 1970, at the same time on page 1550 of the transcript I asked you, "And if you had too large a percentage of the market, was it fear that you would have an illegal monopoly in the market? Is that what you were worried about?

"Answer: Our Legal Department was, yes, sir, I guess. Yes, sir."

[3504]

Any reason to change that testimony now?

A. No, sir.

Q. Now, then your Legal Department was worried?

A. I guess, I don't know what their—

Q. You said, "yes."

A. I said I guess.

Q. No—I take it back. As to your Legal Department—I better read it again and straighten it out.

"Question: And if you had too large a percentage of the market, was it fear that you would have an

illegal monopoly in the market? Is that what you were worried about?

"Answer: Our Legal Department was, yes, sir, I guess. Yes, sir."

I'm sorry. Your legal Department you guess was worried about it, but as to yourself, you said, "Yes," you were worried about it; is that the meaning of that answer?

A. No, I think I explained it to you that I was concerned with our relationships with our customers, I had been told by our Legal Department that 25 percent of the market is not illegal, I have also known from my own business experience that 25 percent of any market is not control of any market.

[3505]

Q. Sir, do you know from your own legal experience whether or not the question of control of the market depends upon a number percentage at all?

A. I am not a lawyer, sir, I would not—

Q. Did your lawyers inform you that there was any particular number of percentage of the market which would determine whether or not your acquisition of a center or operation of a center was illegal?

A. May I have that question again?

(Record read.)

A. Not to my knowledge, no, sir.

Q. So far all you know it could be that 25 per cent might make it illegal or 50 per cent or 75 or no per cent at all; is that right?

You don't know, isn't that the answer?

The Court: Don't answer it.

Mr. McNeill: Your Honor, there are about three questions. I have no objection to the last one as to whether he knows, but the others—

The Court: Do you know, Mr. Rudo?

The Witness: From a legal point of view?

The Court: Based on your experience.

The Witness: Based on my—only what our legal—

The Court: Legal or otherwise.

[3506]

The Witness: My own business experience, there is no control of the market. Our legal department informed me that 25 per cent was not an illegal part of the market, they told me that 25 per cent of the market was not illegal.

What the other percentages are, I don't know, sir.

Q. Who told you that?

A. Our legal department.

Q. Nonetheless they advised you not to operate in San Fernando?

A. Yes, sir.

Q. And didn't you say just a few minutes ago that 25 per cent is your opinion of what you had in that market?

A. Yes.

Q. Sir, do you have any idea of the percentage of market control—I will withdraw that.

Mr. Rudo, do you know what percentage of the competitive market in the Paramus area is occupied by Brunswick?

My question is do you know?

A. No, sir.

Q. And in relation to the Pueblo, Colorado, bowling market, do you know what percentage is occupied by Belmont?

[3507]

A. No, sir, I don't.

Q. In relationship to the Fort Lauderdale area, do you know what percentage of the market is occupied by Brunswick in that competitive area?

A. No, sir.

The Court: How about Poughkeepsie when Brunswick operated Dutchess?

The Witness: No, sir.

Q. Did you say you didn't know as to Poughkeepsie?

A. I have no idea.

Q. Now, sir, did there come a time when Brunswick acquired a chain of bowling centers in Indiana?

A. Yes, sir.

Q. About when did that hapapen?

A. I'm sorry, sir?

Q. About when did that happen?

A. Early 1965.

Q. And do you know how many centers were involved?

A. Six.

Q. Did you have any clearance of that acquisition from your legal department?

A. I may have, I don't remember specifically now.

Q. You don't remember one way or the other?

[3508]

A. Not right now, no, sir.

Q. Now, do you remember what the nature of Mr. Lieblich's complaint was concerning the opening of the new center in Pueblo, Pueblo, Colorado?

A. Yes, sir. I think I testified to that on the—early in my testimony.

Q. What was the nature—

A. He felt there would be too many bowling centers, too many lanes, actually, in the broad area of Pueblo.

Q. And that the area—

A. And that he was not doing well.

Q. And that the area could not sustain profitably an additional center; is that what you're saying?

A. Yes, that was what he was saying, yes.

Q. Do you know whether or not the proprietor who opened the new center in Pueblo after Lieblich had given his opinion to Brunswick made a success of it?

A. Evidently he did not. We took it over, we repossessed it. We repossessed the equipment in it.

Q. And then operated Pueblo with the earnings or net profit and cash flow as was described a little while ago in your testimony?

A. Yes, sir.

Q. Now, do you know whether or not this history doesn't show that Mr. Lieblich's prophecy was correct;

[3509]

didn't Mr. Lieblich say this area couldn't support an additional center, and didn't the history of the owner who took Belmont and then Brunswick itself prove that Mr. Lieblich was right up until 1970?

A. In my opinion?

Q. Yes.

A. No, sir.

Q. What happened; why was Belmont such a failure for two organizations, the prior owner and Brunswick itself?

A. I don't consider it a complete failure from Brunswick's operation.

Q. Not any longer, not with the upswing in bowling, isn't that right, in 1970, 1971?

A. I found our experience in operating Belmont tied very close to the manager we had there, and when we had a bad manager there in those two or three years is where our difficulty occurred, and when we had good managers in the Belmont Pueblo—Bowl in Pueblo, we had a positive cash flow and/or a profit.

Q. Well, Lieblich was advising you, was he not, not to let another business man come in and open a center because the area couldn't profitably support it; isn't that what he was doing?

A. Yes—well, not completely, no, sir. He was—

[3510]

he had not done well and I think he was trying to protect his bowling center.

Q. Well, the nature of his advice was don't open another center; isn't that right?

A. Yes, sir.

Q. And the reason given, if I understand your testimony, was that the area couldn't profitably support another center; isn't that right?

A. No, sir.

Q. I thought you just said that.

A. That's not what I said, I don't think.

The Court: Didn't you testify yesterday that originally you were against opening Belmont, only after an evaluation was made that you were convinced that it could take another center?

The Witness: Yes, sir.

The Court: All right, Mr. Hoffmann.

Q. Was not the nature of Mr. Lieblich's complaint that the area could not profitably support the new center; is that what you're saying?

A. No, sir, not completely.

Q. You testified concerning this matter in 1970, did you not?

Do you remember testifying concerning this matter in 1970?

[3511]

A. I don't remember it, no, sir.

Q. Well, perhaps I can serve to refresh you.

Mr. McNeill: Excuse me.

Mr. Hoffmann: Page 1558 of the transcript, April 9, 1970:

Q. "Question: And was it not the nature of Mr. Lieblich's complaint that the area could not sustain profitably this new center in Pueblo, Colorado?

"Answer: Yes, sir.

"Question: Do you happen to know whether or not the proprietor who opened the new center in Pueblo after Mr. Lieblich advised Brunswick against one being opened was able to make a go of it?

"Answer: Yes, sir.

"Question: What happened to him?

"Answer: He failed as a business. We had to repossess the bowling establishment.

"Question: He failed as a business, isn't that so?

"Answer: That's right, sir.

"Question: So Mr. Lieblich's advice to Brunswick was not bad advice, was it, Mr. Rudo, in connection with Pueblo?

"Answer: No, sir.

"Question: And indeed, Brunswick's failure to follow it resulted in another businessman going under?"

[3512]

I will read that again.

"Question: And indeed, Brunswick's failure to follow it resulted in another businessman going under; isn't that what happened?

"Answer: Yes, sir."

Anything there you want to change?

A. No.

Q. Now, do you remember, Mr. Rudo, that yesterday in the course of my cross-examination I referred to an advertisement for a bowling center on the West Coast which charged $2—I'm sorry, $2.25 for a complete breakfast, three games and free shoes?

A. No, sir.

Mr. Hoffmann: Perhaps Miss Costello will be good enough to mark for identification a copy of the Pacific Bowler, page 24, dated April 20, 1973, and the only matter on the document that I am concerned with or that I am identifying is an advertisement for Brunswick's Rossmoor Bowl, Seal Beach, California.

(Exhibit P-75 marked for identification.)

Mr. Hoffmann: May the record show I have already shown this to Mr. McNeill? This is the advertisement which I represented to the Court I would bring into court today.

[3513]

The Court: Yes.

By Mr. Hoffmann:

Q. I show you this advertisement, Mr. Rudo. Is Rossmoor Bowl a Brunswick operated bowling center?

A. Yes, sir.

Q. Is the price listed there $2.25 for a complete breakfast, three games and shoes; is that a price which you approved?

A. Every Sunday at 9:00 a.m. to noon, it looks like a very good promotion to me.

Q. Good promotion?

A. I would think so, on Sunday morning when most bowling centers are empty, it looks like a good promotion.

Q. No reason for any disciplinary action against the manager of Rossmoor for this?

A. For that promotion, I don't—I know of no reason, no, sir.

Q. Now, sir, you said that since Brunswick has taken over that the prices only go up; isn't that right?

They don't go down?

A. That's right.

Q. Is it a matter of price, a complete breakfast—what is the usual price for a game, if you know?

A. In California?

[3514]

Q. In California.

A. I don't know in that particular bowling center.

Q. Do you have any idea of the range in which it might fall; would it be less than 50 cents?

A. No, I don't think it would.

Q. Would it be more likely 75 cents?

A. It would be probable—could be, yes, sir, could be in that area.

Q. If it were in the area of 75 cents and there were three games, that would be three times 75, would it not, or $2.25?

A. Yes.

Q. Do you know what shoes normally cost?

A. I would guess around a quarter.

Q. And there would be tax on them, wouldn't there, in normal prices, they don't give away shoes free, so it would be about two and a half?

The Court: You mean the rental of shoes?

Mr. Hoffmann: Rental of shoes, of course.

Q. And, sir, a complete breakfast in California, have you any idea what that is worth?

A. No.

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[3517]

Q. Mr. Rudo, you testified yesterday that Brunswick started construction on a new bowling center for the Omaha area, is that correct?

A. Yes, sir.

Q. Is that pursuant to any contract with an independent proprietor, or that it was being built for use by someone else?

A. We tried to sell it, but this one, as it is going now, is to be operated by BCO.

Q. That's the Brunswick bowling operating division, is that right?

A. I'm sorry, I didn't hear you.

Q. By Brunswick's bowling operating division?

A. By BCO, which is our operating division; yes, sir.

Q. Now, sir, how would you describe this center in terms of what has been planned for it, is it going to have modern features?

A. Yes, sir.

Q. What will those features include?

A. I don't know what you mean.

Q. Well, is it going to have the latest in automatic pinsetting equipment?

A. The latest in automatic pinsetting equipment is of vintage 1962.

[3518]

Q. You are going to put in some pinsetters that you repossessed?

A. Probably.

Q. Well, do you know?

A. I don't remember right now, sitting here; no, sir. But all the BCO's, that I know of, that we built, we put in used equipment, yes, sir, used pinsetters.

Q. The pinsetter isn't seen by the public itself, except from a masking in front, is it?

A. That is correct, sir.

Q. So far as the public is concerned, whether it is '62 or '72 would make no difference, as far as the bowler is concerned?

A. That's right.

Q. The lanes, however, will be new, will they not?

A. Yes, sir.

Q. The statement is made, " 'The bowling center, the first Brunswick owned in Nebraska, will be the most modern in the world when it opens because it will feature computerized automatic scoring,' Chauncey says," is that correct?

A. If he says it, I would guess it will be; yes, sir.

Q. Well, sir, could you describe computerized

[3519]

automatic scoring; is that a new development?

A. Yes, sir; there are three of them on the market, one we manufacture, one that RCA——

Q. How about describing the one you manufacture?

A. Well, to my knowledge, they are all computerized. RCA is manufacturing——

Q. Would you describe the one that you manufacture?

A. Well, it scores each game of bowling for every bowler. The bowler does not have to write a score down.

Q. The description here is, "'The system employs automatic pinsetters with sensors that relay information to computer units for score keeping. All the bowler does is identify himself and roll the ball,' Chauncey says."

Can you elaborate on that?

A. They, all three of them, do the same thing; yes, sir.

• • •

[3554]

BERNARD RUDO, called as a witness on behalf of the Defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Seeley:

Q. Mr. Rudo, will you state your name and tell your address, please, where you live?

A. My name is Bernard Joseph Rudo. My address is 1714 McCraren Road, Highland Park, Illinois.

Q. By whom are you employed presently, Mr. Rudo?

[3555]

A. Brunswick Corporation.

Q. In what capacity?

A. Vice president of operations of BCO.

Q. Have you been associated with the bowling business for a considerable time?

A. Yes, sir, since 1956.

Q. Would you please trace your association with the bowling business since that time, and state who you worked for and in what capacities, and in general what your duties were?

A. In 1956 I was hired by Fair Lanes, Inc., in Baltimore, Maryland.

I commenced work in the summer of that year as an assistant manager in a pin boy establishment, prior to the automatic pinsetters, and then later on I managed a bowling center in Baltimore for Fair Lanes, and eventually became a district supervisor of four bowling centers for Fair Lanes in Baltimore.

I also handled some of their lease negotiations and site work.

I handled some of their merchandising up until 1959.

In 1959 I was employed by American International Bowling Corporation, which at that time they were based on Beaver Street in New York.

[3556]

My position upon hiring was vice president and general manager of American International Bowling Corporation.

My prime responsibilities for them at that time was to select managers, assist in site location, set up the houses as we opened the bowling centers, help promote the bowling centers, set policy as it pertained to the operation of the bowling centers, develop any new programs and assist in the total management of the operating facilities as it related to bowling, food, beverage and vending at that time.

I joined American International in June of 1959, and held the position of vice president and general manager until June of 1963.

In the meantime American International moved its executive offices from downtown New York to West Englewood, New Jersey, in Bergen County.

I resided during this period of time from June 1959 in Woodcliff Lake in Bergen County.

In 1963 I was appointed by the Board of Directors of the American International to be the president of this company. We operated at that time better than 30 bowling centers stretching from Arkansas in the West, South to Daytona, Florida, and North to Haverhill, Massachusetts.

[3557]

From 1963, upon my appointment as president, until late Spring of 1964, I carried on this function and reported to the Board.

In 1964, upon the filing of bankruptcy proceedings by American International, here in this building, I worked for the Receiver, Mr. Sanford Silverman, until the liquidation of AIBC in March of 1965.

In March of 1965, upon the purchase of the corporations that then existed by Brunswick, I was employed by the Brunswick Corporation as the Eastern Regional Manager for Brunswick. My territory and responsibilities were as follows:

We covered from the northern part of Canada through the Ohio market and south to Florida. I had the responsibility of operating not only the American International Bowling centers that were acquired by Brunswick, but the centers that were repossessed by the corporation during the succeeding years.

In January of 1967, I was appointed to my present position. And I moved from New Jersey to Chicago and reside at my present residence since January 1967.

My responsibility in 1967, as vice-president of operations, was to assist management in policy, but mainly to operate the bowling centers, according to policy, that were in our portfolio at that time,

[3558]

and any succeeding centers that became part of Brunswick. I hold the same position today, sir.

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[3575]

Q. Mr. Rudo, what is the extent of your familiarity with Bergen County, New Jersey?

A. I resided in Bergen County from 1959 to 1967. And I directed the operations of the former AIBC centers as well as the BCO centers. I think I have a very good understanding of Bergen County.

Q. Have you made any survey of present and former bowling centers in Bergen County?

A. Yes, I have.

Q. When did you do that?

A. I did that during the second week and part of the third week of April.

Q. And in what manner did you conduct this survey?

A. I used the Garden State Bowl-O-Mat as the center of the wheel, and I drove from Garden State Bowl-O-Mat out to different centers on this map, and back to check my distances, as well as visit the open centers in Bergen County.

Q. Did you have with you any lists of centers in Bergen County while you were doing this?

A. Yes, sir.

[3576]

Q. What lists did you have?

A. I had the lists supplied to me by the company. And I also had a list that we had gathered from the records of the Bergen County Men's and Women's Bowling Association.

Q. And did I understand you to say that by driving in your car, beginning at the location of Garden State Bowl-O-Mat, you measured on the speedometer of the car the distance from there to each of the centers you visited?

A. Yes, sir.

Q. Now, what other facts, besides the existence of the open centers and the distance by car from the Bowl-O-Mat center, did you ascertain during this survey?

A. The centers that were open I visited, looked at the equipment, verified the number of lanes, verified the address, determined what type of equipment was being used, what type of pro shop items, if I could, were being sold, whether it had a snack bar, bar facilities, and tried to estimate the age of the equipment, from my knowledge.

I also visited the areas where the closed centers were listed and, where possible, I tried to determine how long they had been closed; if I could, I sought out

[3577]

someone in the existing business that replaced the old bowling center to find out how long they were there.

In one case, for example, the place had burned down and there was an apartment house there. I tried to determine what businesses were presently in the closed centers, if possible, if the buildings were still standing.

Mr. Seeley: I am going to have marked as Exhibit D-50 for identification a map mounted on cardboard which is entitled "Hagstrom's Street and Road Map of Bergen County, New Jersey, including cities of Paterson and Passaic." And for the use of the witness, and counsel, we have photographic copies of that map.

(Exhibit D-50 marked for identification.)

Q. Showing you a copy of Exhibit D-50 for identification, do you observe that this map has on it circles with numbers in them and squares with numbers in them?

A. Yes, sir.

Q. And do you know what the significance of the squares versus the circles is?

A. The squares denote the closed centers and the circles denote the open centers.

[3578]

Q. Do you also observe that on the margin of the map there is a legend listing bowling centers by name and giving them numbers which correspond to numbers on the circles and squares?

A. Yes.

Q. And do you notice that opposite the names of some of the centers there named there are asterisks?

A. Yes.

Q. And do you notice at the bottom of the legend there is an asterisk followed by the word, "closed"?

A. Yes.

Q. Did you have a copy of this map with you when you made the survey you have described?

A. Yes, sir.

Q. And did you personally visit in the course of that survey every location marked on this map by a round circle indicating an open bowling center?

A. Yes.

Q. And did you visit the former locations as best you could determine them, of the closed centers marked by squares?

A. Yes.

• • •

[3580]

Q. Mr. Rudo, I show you Exhibit P-14, which is in evidence, plaintiffs exhibit, and it is entitled, "Paramus Market."

Do you see the name of Interstate on that?

A. Yes.

Q. There is a column headed, "Distance from Bowl-O-Mat," do you see that?

A. Yes.

Q. What does it say opposite Interstate?

A. Seven and a half miles.

Q. Did you drive in your car from Paramus

[3581]

Bowl-O-Mat to Interstate Lanes?

A. Yes, sir.

Q. Did you drive it once, or more than once?

A. I drove it as recently as yesterday. I have driven it in the last two weeks maybe about half a dozen times.

Q. How far did you find that distance to be on the speedometer of the car you drove?

A. 12.1 miles.

Q. 12. one-tenth miles even?

A. Yes.

• • •

[3585]

Q. Mr. Rudo, would you please step to the map and point to the location of Paramus Bowl-O-Mat?

The Court: Please use the pointer, Mr. Rudo.

Can the jury see?

Do we have the extra maps? Why don't we have the jury follow that.

Mr. Seeley: We don't have that many.

The Court: Maybe one to each two jurors.

A Juror: We can see that, your Honor.

The Court: Sorry, just trying to be accommodating.

Q. Will you please point to the location of Paramus Bowl-O-Mat, sir, and state what number sticker it is?

A. It is sticker number 1, 36 Brunswick lanes.

Q. Now, will you please point to Ten Pin on the Mall and state what number that is?

[3586]

A. That is number 3, 36 Brunswick lanes.

The Court: Tell the jury what community it is in.

The Witness: It is in the community of Paramus bordering Maywood.

Q. And the location of Lodi Lanes, please?

The Court: In Lodi, New Jersey?

A. It is in Lodi, New Jersey, it is number 52, 40 Brunswick lanes.

The Court: I suggest you also answer what county, if you know.

The Witness: Bergen County.

The Court: All right.

Q. Now, Interstate Lanes, please.

A. Interstate Lanes is number 17, 40 Brunswick lanes, in Ramsey, New Jersey.

The Court: What county?

The Witness: It is in Bergen County.

Q. Mr. Rudo, you will observe on the legend of that map that the scale of the map is shown in feet rather than as often is the case in miles or parts of a mile; is that right?

A. Yes, sir.

[3587]

Q. Now, did you work out from that how many inches on a ruler represent five miles on the scale?

A. Yes, sir.

Q. How many inches was it?

A. Eleven and a half.

Q. And do you observe on the map, sir, that there is—has been drawn in heavy pencil a circle; did you observe that?

A. Yes.

Q. And do you know what is the center of that circle?

A. Yes, sir.

Q. What is it?

A. It is location number one, Garden State Bowl-O-Mat.

Q. Did you check with the ruler the distance from number one to the perimeter of the circle?

A. Yes.

Q. How far is it?

A. It is five miles or 11 and a half inches.

Q. You may resume the chair, sir.

Have you counted the number of round stickers which are within that five-mile circle?

A. Yes, sir.

Q. How many did you count?

[3588]

A. 22.

Q. How many of those circles represent centers operated by BCO?

A. Three.

Q. What percentage are three centers of 22 centers?

A. My calculation is 13 percent.

Q. Have you counted the number of lanes in the centers marked by those 22 round stickers?

A. Yes.

Q. How many did you count?

A. 580.

Q. Have you counted the number of lanes in the three BCOD centers which are in that circle?

A. Yes.

Q. How many were there?

A. 108.

Q. Have you calculated what percentage 108 lanes are of a total of 580 lanes?

A. Yes.

Q. What percentage?

A. 18 percent.

Q. Now, have you also counted the number of round stickers on the entire map?

A. Yes, sir.

[3589]

Q. How many did you count?

A. 36.

Q. How many of those are BCO operated centers?

A. Four.

Q. Does that include Interstate in addition to those within the five-mile circle?

A. Yes.

Q. And have you calculated what percentage four centers are of 36 centers?

A. Yes.

Q. What percentage is it?

A. 11 percent.

Q. Have you counted the number of lanes in the centers marked by those 36 round stickers?

A. Yes.

Q. How many did you count?

A. 943 lanes.

Q. Have you counted the number of lanes in the four BCO operated centers?

A. Yes.

Q. How many?

A. 148 lanes.

Q. What percentage are 148 lanes of 943 lanes?

A. 15 percent.

Q. Now, have you also counted the number of lanes

[3590]

indicated on the map as having been located at one time at the points marked by the square stickers which are within the five mile circle?

A. Yes.

Q. How many lanes did you count?

A. 182.

Q. Now, eliminating all of those centers indicated as having fewer than 20 lanes, how many lanes did—in such of those centers as had 20 or more lanes?

A. There are four centers.

Q. How many lanes?

A. 90.

Q. And have you also for the entire map counted the number of lanes indicated by the centers represented by square stickers?

A. Yes.

Q. How many did you count?

A. The total—may I ask you——

Q. Well, you have given us inside of the circle. How many outside of the circle?

A. I have 118 lanes outside of the circle.

Q. Again, eliminating those centers which are indicated as having had less than 20 lanes, how many lanes do you have left in those closed centers?

[3591]

A. 68 lanes.

Q. Mr. Rudo, when did you take over the operation of the former AIBC centers for Brunswick Corporation?

A. In—really March 27, I believe, it was the day after —the bankruptcy hearing, 1965.

Q. And did the operation of those centers for Brunswick begin immediately following that sale?

A. Yes.

The Court: How many? I don't recall.

Mr. Seeley: In this area or all together?

The Court: AIBC.

The Witness: In total?

The Court: In the country.

The Witness: At the bankruptcy sale, I believe 26 centers were sold.

Q. Now, at that time, namely, at the time you took over the operation of those centers for Brunswick, was

there a BCOD or Bowling Center Operations Division of Brunswick?

A. To my best recollection, the BCOD Division was formed in late 1964, and continued on, and we joined the BCO Division in March of 1965.

Q. At the time the AIBC centers were taken over by BCOD in March of 1965, did you or did BCOD

[3592]

change any of the operating policies of those centers?

A. No, we did not because we were in the midst of a league season and our leagues ended in late Spring, it could be anywhere from the end of April to the mid part of May, and we decided to continue the policies that were in effect at the time.

The Court: Excuse me. Before BCOD took them over, who operated them, Brunswick?

The Witness: Who operated——

The Court: After the bankruptcy sale, who took over those centers?

The Witness: BCOD.

The Court: BCOD directly.

The Witness: Yes.

The Court: I thought they were in Brunswick's hands for a while and then transferred to the Division.

Mr. Seeley: No. The Division was created before the bankruptcy sale, it was already in existence.

Q. In your answer as to not changing the policies, do you include in that bowling prices and the terms of league contracts?

A. Yes.

Q. Who was your superior at that time when

[3593]

you became the Eastern Regional Manager of BCOD?

A. My brother, Milton Rudo.

Q. At that time or within a few days after you became Eastern Regional Manager, did Milton Rudo say anything to you as to what he wanted BCOD's pricing policies to be?

A. The direction that I received in the Spring of 1965 was to maintain the prices that we had charged and he did not want any price cutting.

Q. At the time when or after BCOD took over the operation of any AIBC center were the prices charged for bowling ever lowered to less than AIBC had been charging immediately prior to the takeover?

A. No, sir.

Q. Now, do you need to refer to any records to be sure of that?

A. No.

Q. Why are you sure of it?

A. I'd like to just describe the AIBC organization if I may briefly.

Q. If it is necessary to answer the question, do so.

A. Eight to ten bowling centers that we had in a geographic area, we had a supervisor who was known in those days as a regional manager.

[3594]

The gentleman had worked for me since 1959, I trusted them, I selected them. They performed well for me, and I knew that our policies as promulgated to them would be carried out, and I had trust and confidence that they would follow the directives that came from my office,

they worked for me and they joined the company, the Brunswick Corporation, upon the takeover.

Q. What directions did come from you to those district managers?

A. I don't understand your question.

Q. Did you give them any instructions with respect to what the prices and league terms were to be in the former AIBC houses?

A. Yes, I told them to maintain the terms and conditions that we had in effect, and I also had knowledge of the fact that we were going to have a general BCOD meeting in late Spring to effect policy and I'd report back to them at that time whether any changes would come about.

Q. As the regional manager, Eastern Regional Manager for BCOD, what, if any, means did you have of knowing whether or not your instructions about pricing were being followed up in those centers?

A. We had various ways to audit the performance of any bowling center as well as any district operation.

[3595]

They took the form of an outside shopping service that made surprise shopping visits to centers. We had a travelling internal auditing group that made surprise visits to the centers.

We had a corporate auditing group that also visited the centers.

We had our outside auditors also making surprise visits to the centers.

In those days many of us in the higher management groups visited the centers by surprise or by announced visits.

We had daily cash reports that were audited in the Accounting Department.

We posted our open play prices for all of our customers to witness and to see what we were charging.

[3596]

We had league agreements that listed the price, the week, the terms that we agreed upon with the leagues. In general, we felt that we had a complete control system at that time.

• • •

Q. Mr. Rudo, in addition to the centers—former AIBC centers purchased at the bankruptcy sale, to which you testified, did BCOD in 1965 take over the operation of other bowling centers?

A. Yes, sir.

Q. Were those the centers that were repossessed—from which the equipment had been repossessed by Brunswick?

A. Yes, sir.

Q. With respect to those centers, were your instructions to your district managers, about pricing policy, the same as they were with respect to the

[3597]

former AIBC centers?

A. Yes, sir. If we had a league season to finish, if it was in spring, once the league season was finished, then we, in many cases, changed the pricing, or the general promotion scheme in these centers, as the April and May period ended, and we got into the summer season.

Q. Did you encounter any resistance on the part of customers to the raising of the prices?

A. You bet. Yes, sir.

Q. And what did you do to deal with that resistance?

• • •

[3599]

A. I told my supervisors to take a firm position and maintain a firm stance.

Q. Did you have any meetings or confrontations with league officers in that connection?

A. Did I personally?

Q. No, did the organization which you supervised?

[3600]

A. Yes, sir.

Q. What was the nature and purpose of those meetings?

A. We instituted a policy of conducting league officer meetings twice a year, at which time we invited the league officers to come into our place of business, leagues that bowl in our center, and listen to our program and listen to our pricing policy.

Q. Now, Mr. Rudo, did AIBC, prior to March of 1965, have a summer bowling plan for youngsters which consisted of a package of three games of bowling, a hot dog and a Coca-Cola?

A. Yes, sir.

[3601]

Q. Will you please describe in a little more detail exactly what that program encompassed?

A. That program encompassed the promotion in our mind of junior bowling in off hours, in the late spring and all summer. It involved—the question asked—three games of bowling, shoes, a Coke and a hot dog, the thought being to build new business, get new juniors in.

We were competing, in our minds, with the outdoor activities, the camps, the swimming, the Little Leagues baseball. And it was our feeling that we could generate some new interest in bowling by youngsters.

Q. After you went to BCOD as Eastern Regional Manager, did you install that program in all of the BCOD houses under your supervision?

A. Yes, sir.

Q. Did that program have a name?

A. I believe in 1965 we continued with the name of Junior Friendship.

Q. What were the times of the week, or day, during the spring and summer when this program was available to young people?

A. This program was conducted after our junior league season, which ended in late March. So we started on Saturdays in April and May, and then we went on Mondays,

[3602]

and Fridays, in June, and July, and August, during the daytime hours.

Q. Only during daytime hours?

A. Yes, sir.

Q. During the late spring, after the end of the league season, and during the summer, what amount of activity prevails in bowling centers you are familiar with as compared with the activity during the fall and winter season?

A. It has been my experience that generally you do about one-sixth, or somewhere between 12 and 15 per cent of your total business in the summertime.

Q. You mentioned in your testimony that you said to your district managers that later there would be a formulation of policies by BCOD. Did that occur?

A. Yes, sir.

Q. When did that occur?

A. In late spring—I believe it was May of 1965—a meeting was called for all the supervisors to appear in Chicago. And at that meeting the AIBC group was asked

to present its promotion program to the total BCO supervisory group. Some of the programs in their existing form were adopted, some were changed and some, I believe, were dropped.

Also, at that meeting we started our systems and

[3603]

procedures in a formalized form and developed a systems and procedure manual to use in our operation.

Q. Does BCOD have a promotional consideration which is called the Achievement Award Program?

A. Yes, sir.

Q. Would you describe that, please?

A. The Achievement Award Program that we use is based mainly on the achievements of our internal bowling population, namely, the league bowlers that bowl in our centers. It is to reward these bowlers in the form of patches, trophies, it can take the form of an ashtray, by accomplishment. It could be on a 200-plus game for women, it could be a 250 game for men. And it is awarded to bowlers that bowl in our leagues, in our bowling centers, during the course of both the winter season and the summer season.

Q. At the meeting you have mentioned in late spring of 1965, was any policy evolved for BCOD about the number of weeks for which a league bowling program would be contracted for?

A. Yes, sir.

Q. What was it?

A. We established that we would attempt 35 weeks at night, starting with the fall season, which generally begins from the Labor Day period and ends—whatever

[3604]

the 35-week period would be, depending upon the holidays, and a 31-week league season for our daytime bowlers.

Q. Were there any places in the country where that program was difficult to implement?

A. Yes, sir.

Q. Where?

A. We had found in our repossession of bowling centers in Los Angeles, Greater Los Angeles, Orange County, that the tradition, the precedent in that area had been 33 weeks at night, by the leagues.

We also found in Buffalo, New York, in some cases the same thing prevailed.

In some of the communities in Indiana, 33 weeks was the traditional number of weeks required.

We found this to be the case in Ohio in some cases.

That's my best recollection.

Q. Did you sometimes or always make exceptions to your 35-week policy when you found the local custom was otherwise?

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[3605]

A. We have made exceptions; yes, sir.

Q. Have you done anything which has resulted in reducing the number of those exceptions over the years from 1965 to the present time?

A. Yes, sir.

Q. Has the number of exceptions been substantially reduced?

A. Yes, sir.

Q. At the meeting in the late spring of 1965 was any basic BCOD policy devised with respect to the so-called promotional items or inducements which BCOD houses would offer to league bowlers?

Mr. Hoffmann: I object to the question on the ground that there has been no foundation for what is meant by basic BCOD policy.

The Court: I will sustain it as to form. Rephrase it.

Mr. Seeley: Withdraw the question.

Q. Was any policy evolved at that meeting with respect to promotional items, or so-called inducements to be offered throughout the country in BCOD centers?

A. Yes, sir.

[3606]

Q. And what was the policy which was evolved?

A. The policy was that a nighttime league that bowled 35 weeks would get five trophies, or four, depending upon the number of people on a team; they would be eligible for our patch and achievement award program, if they accomplished the scores; they would be eligible for the Bowl-Your-Way-to-Europe Tournament; they would be awarded ten free games for our summer activity.

And that's the total program that you refer to.

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[3648]

Q. When was it that the Bowl-Your-Way-To-Europe tournament took shape in the BCOD organization?

A. At the meeting in Chicago.

Q. And will you describe what that tournament consists of; how is it operated?

The Court: Are we speaking now about the Spring of 1965 or thereabouts?

[3649]

Mr. Seeley: And thereafter, yes.

A. This Bowl-Your-Way-To-Europe tournament is still in effect today. This is our eighth year of conduction.

This tournament is based on pins over average, and every month in a BCO center all bowlers that bowl in 35 week leagues at night and bowl in 31 week leagues in the daytime are eligible, each month, and we have two classes, 150 average and over for men as well as 149 and under, two classes in the men, two in the women, there is 125 and over and 125 and under.

These we select—these people are selected each month. There would be four each month.

They ultimately bowl at the end of 12 months in a roll-off in a BCO center, and the man and the woman that have the most pins over average are invited to our Washington tournament and they get a trip to Washington, D. C. to bowl against all of the other bowlers in the other BCO houses that we have operating as well as the management houses that we manage for others.

We also bring in our Canadians to this tournament.

We also invite our small bowl winners. We conduct an independent tournament which we call Bowl-Your-

[3650]

Way-To-Bermuda for our small bowl, candlepin, five pin, tenpin and duckpin. And we invite them in as guests.

So we have approximately 300 to whatever, 400, depending on the number of houses participating, bowlers.

Generally, it's been about 350 to 360 bowlers that participate in this roll-off.

The male winner with the most pins over average and the female winner with the most pins over average are awarded a free trip to Europe; that's why we call it, "Bowl-Your-Way-To-Europe."

And they can take their spouse to Europe with them.

They bowl in an IBCO center in Europe.

Q. Is the cost of this Bowl-Your-Way-To-Europe program charged to the individual BCOD centers?

A. Yes.

Q. Does BCOD have a budget for its promotion and advertising?

A. Yes.

Q. What is that budget?

A. Three percent of gross receipts.

Q. Does this cost of Bowl-Your-Way-To-Europe have to become part of that three percent?

[3651]

A. Yes.

Q. Have you made a calculation as to the approximate cost per line of bowling of the Bowl-Your-Way-To-Europe program?

A. Yes, sir.

Q. How did you make that calculation?

A. The cost of Bowl-Your-Way-To-Europe is estimated at—

Q. No, just—

A. How did we make it?

Q. How did you make the calculation?

A. I divided the total lines bowled in 1972 into the number of lanes that we had in the domestic operation.

Q. And you took into account a cost, did you, of the—overall cost of the program?

A. Check me on that. I took the total number of lines into the cost, I'm sorry, and the cost was—I used the figure of $150,000.

Q. And having made that calculation, what figure did you come out with as the cost per line?

A. Three-tenths of one percent.

Q. Can you state approximately what it comes to per bowling lane of BCOD's lanes?

A. Approximately 24 to $25 a lane.

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[3652]

Q. Mr. Rudo, do BCOD houses as a matter of regular league policy give to league bowlers coupons entitling them to a certain amount of free bowling?

A. Yes, sir. Our contract provides that ten free games of bowling to bowlers that sign up and bowl our 35-week schedule at night, 31 weeks in the daytime.

[3653]

Q. Is there a cost to BCOD of giving those free bowling coupons to league bowlers?

A. I don't apply a cost, sir.

Q. Well, is there?

Does it actually cost BCOD anything to give away those coupons?

A. The bowling centers are open, we provide those coupons for bowling in a period of time of late spring until almost the end of July, and we provide one game per bowler per time bowled.

We checked this return, oh, it must have been two or three years ago, and we were getting for every free game two paid games.

We were getting a total of about 18 per cent redemption of the total of tickets that we passed out.

Q. Now, it has been testified here that the first thing BCOD does when it takes over the operation of a center is to modernize the equipment; is that right?

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[3654]

Q. Is it a fact, Mr. Rudo, that BCOD makes a practice of modernizing the centers which it takes over for operation at or very shortly after the time it takes them?

A. No.

Q. What is the policy of BCOD with respect to modernization of the equipment in the centers which it operates?

A. I'd like to just explain this for a minute, if I may.

In many of the repossessions, our leases were for—of short-term nature. When I say "short-term

[3655]

nature," they could have been two-year leases, three-year leases with a number of options.

So the first thing we considered was our initial term in the bowling center as far as a tenant.

We also considered the history of its performance if we were able to secure it. As to what we did as far as expenditures, we—if we operated a period of time we developed our own history which we could use.

We had the market survey made by our evaluation group which told us of the potential of this location in the future, and there were some forecasts made—made by the evaluation group upon takeover.

We also determined if we could get a price increase.

We determined the—we looked at the physical facilities to see whether we had to repair or replace the air conditioning, parking lots, the roof, many of these buildings were 10 and 12 and 14 years old, they were misused, abused, so in some cases we were forced to do it whether we wanted to or we didn't.

What do I mean? We were forced to coat a parking lot. We were forced to repair a roof in order to protect the chattels that were in the center, the lanes, any number of situations prevailed concerning the demands on us to put these facilities into shape.

[3656]

Now, when you talk about modernization—

Q. Would you please direct your answer specifically to the modernization of the bowling equipment?

A. In the case of bowling equipment, we are governed by the financial group of our company, the comptroller's office and the treasury department, as far as our capital expenditures.

We, to my best knowledge, in every year of BCO operation had a certain budget set aside in capital expenditures.

Before we could expend any money in any way, shape or form, we had to submit a project requisition. Depending upon the level of the expenditure, different approvals were gathered, and if we were going to improve bowling equipment, depending upon the nature of improvement to bowling equipment, depending upon where the approval was granted, in some cases the division president could grant the approval provided it was within budget, we weren't exceeding our budget, in some cases it had to go to the president of the company, in some cases it might have worked its way to the Board of Directors.

Q. Just a minute.

At that time, sir, at what level was approval

[3657]

necessary to put A-2's in equipment?

A. We needed the approval of the corporate office.

Q. Are there A-2's in Ten Pin on the Mall?

A. No, sir.

Q. Are there A-2's in Lodi Lanes?

A. Yes.

Q. Did BCOD put them there?

A. No.

Q. Who did?

A. They were there when we took it over in 1970. I couldn't tell you who put them in.

Q. Are there A-2's in Fair Lawn?
A. Yes.
Q. About when were they installed?
A. They were installed in 1966.
Q. Are there A-2's in Interstate Lanes?
A. No, sir.
Q. Are there fast ball return devices other than A-2, Brunswick A-2's?
A. Manufactured by Brunswick?
Q. Anybody.
A. Well, we have—
Q. Just yes or no.
A. Yes.
Q. Does Brunswick manufacture any other than

[3658]

the A-2?
A. Yes.
Q. What is the name of that?
A. What is commonly known as the Jet Backs.
Q. Does it perform the same way as an A-2?
Tell us about what it does?
A. Please bear with me, I'm not an engineer, sir, but the A-2 in concept to my understanding speeds the machine up.
The Jet Back lifts the curtain as soon as the ball makes its impact and boosts the ball back through the ball return to the front end. That combination is also with the A-2, and the A-2 machine is speeded up.
The Jet Back is a modification, it just entails the speeding—speedy return of the ball, not the machine.
Q. Have Jet Backs been installed in any BCOD centers?
A. Yes, sir.
Q. Have they been installed in Interstate?

A. Yes, sir.
Q. When, to the best of your recollection?
A. To the best of my recollection, in 1971.
Q. Has there been any increase in the number of fast ball returns, either A-2's or Jet Backs, which

[3659]

BCOD has installed over the years, over the period beginning in 1965?
A. We have installed a considerable number of Jet Backs during the last three years, including 1973.
Q. Is there a reason why you have done that in the past two or three years?
A. Yes. Our performance has improved considerably.
Q. What do you mean by "performance"?
A. Or profit.
Q. Has there been any change in the lineage experience of the BCOD centers?
A. There has.
Q. Has it increased or decreased?
A. Increased every year on the average.
Q. Now, has BCOD increased bowling prices in any of the centers which it operates?
A. Yes.
Q. Has it increased prices at Ten Pin on the Mall over those which prevailed when it assumed the operation of that center?
A. I believe it has.
Q. Do you know?
A. Yes, sir.
Q. Now, in 1968 did BCOD operate Ten Pin on the Mall under a management agreement?

[3660]

A. Yes, sir. It commenced in September of 1968.

Q. And then in—September 1969 did it repossess the equipment there?

A. Yes.

Q. And then it began to operate it—

A. As BCO.

Q. As a BCOD center?

A. Yes.

Q. And under the terms of BCOD's management contracts who has control over the bowling prices charged in a managed center?

A. We—the owner has control.

Q. Do you know whether at any time during the period that BCOD managed Ten Pin on the Mall from September 1968 to September 1969, the owner of that center reduced the bowling prices?

A. Not to my best recollection.

Q. Do you have in your mind any figures as to what were the average prices—what was the average price per line in BCOD houses in 1965 and what it was in 1972?

A. Yes, sir.

Q. What are those figures?

A. The average price in BCO houses in 1965 was 49.9 cents.

[3661]

The average price in 1972 was 59.5 cents.

Q. Does that include daytime prices and junior prices as well as adults?

A. Yes, it is a total mix.

Q. Has there been any price increase in the junior friendship program, three games, a Coke and a hot dog?

A. Yes.

Q. What does BCOD now charge for that?

A. It varies on the geographic area, the metro New York area is $1.75.

Q. Is BCOD contemplating any increases in its bowling prices in the near future?

Mr. Hoffmann: I object to the question. Totally irrelevant and unrelated to the issues in this case.

The Court: Why, Mr. Seeley, assuming they are, what is the relevancy of it?

Mr. Seeley: Simply, as I understand the charge here, is that we undercut the independent proprietors on prices.

I think it goes to our intent.

The Court: All right, I will permit it.

Answer it.

A. Yes.

Q. Why has it not made those increases sooner?

[3662]

A. We are waiting on a decision from our corporate management to allow us to institute the prices. We are part of an organization that's controlled by the Wage and Price Board, and our president has taken the position since Phase II was effected that this corporation due to its increase in profits would not raise price in any way, shape or form, and he is, as promulgated to us, complying with the spirit and the intent of the price rule.

Q. In the meanwhile has BCOD actually prepared schedules of price increases which it would like to make?

A. Yes, sir.

• • •

[3664]

Q. Mr. Rudo, the Court asked a question about the cost to BCOD of the Bowl-Your-Way-To-Europe program on a per line of bowling basis; have you made a calculation of that?

A. Yes.

Q. How did you make the calculation?

A. I divided 50,000,000 lines into $150,000 and I got three-tenths of a cent a game.

Q. Thank you.

Did your brother, Milton, have anything to do with your employment by American International Bowling Corporation?

A. No, sir.

Q. Did he have anything to do with your subsequently becoming the president of that corporation?

A. No, sir.

Q. When you were employed by Brunswick, to work for BCOD, who offered you the job?

A. Mr. Bob Searson.

Q. Was he a Brunswick official?

A. Yes, sir.

Q. What was his position?

[3665]

A. He was assistant to the president of the corporation.

Q. And in what connection had you gotten to know him, or had he gotten to know you?

A. On all matters that—during my term as president of AIBC—relative to the purchasing of Brunswick capital equipment, the renegotiation, if possible, of our debt outstanding, I was informed by Brunswick to make my proposals through Mr. Searson.

Q. Prior to the time when you accepted Mr. Searson's offer of a position with BCOD, did you have any communication whatever about it with your brother, Milton?

A. No, sir.

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[3689]

CROSS-EXAMINATION.

By Mr. Hoffmann:

Q. Let's come back to that. When was the bankruptcy sale for the AIBC centers?

A. March 26.

Q. 1965?

A. 1965.

Q. What was your job on March 25, 1965?

A. I worked for the trustee in bankruptcy.

Q. Weren't you also president—

Mr. Seeley: Let him finish his answer.

Mr. Hoffmann: He answered. He said, "I worked for the trustee in bankruptcy."

Mr. Seeley: And then he started—

[3690]

The Court: Do you want to add something to that, Mr. Rudo?

The Witness: I used the title of president, AIBC, sir.

Q. You were president of AIBC, is that right?

A. That is correct.

Q. And when did you become president of AIBC?

A. In June of 1963.

Q. And you were, from June of 1963 until March 25, 1965, is that your testimony, president of AIBC?

A. I believe it was March 26 at the bankruptcy sale, sir.

Q. At the time of the bankruptcy sale, you were president of AIBC?

A. Yes, sir.

Q. What was your job on March 27, 1965, the next day?

A. I was employed by Brunswick.

Q. The very next day you were in Brunswick's employ, isn't that right?

A. I was employed that night.

Q. That very night you got a job with Brunswick. What was that job?

A. I wasn't told specifically what the job was the

[3691]

night of March 26. I approached Mr. Searson after the bankruptcy proceedings—I believe I have testified to this extent—I asked him if they were going to employ me or offer me a job.

He said, "yes, you are on the payroll. Someone will be in touch with you in the next few days."

Q. As of now, is that what he said; you were on the payroll as of now?

A. That was the night of March 26.

Q. Now, sir, on the night of March 26, had you had any prior contact with the Brunswick organization concerning the matter of the AIBC bankruptcy?

A. I don't understand your question.

Q. Well, the AIBC bankruptcy didn't happen all at once, it didn't happen in the course of a single day, there were things that went on, weren't there?

A. Oh, I had a relationship with Brunswick through the receiver in purchasing maintenance supplies, pins, whatever we needed to operate.

Q. How about through your older brother?

A. No, sir.

Q. You never spoke to him during the period when you were president of AIBC?

A. I spoke to him.

Q. More than once?

[3692]

A. Yes.

Q. Did you have anything to say to your older brother concerning the financial condition of AIBC?

A. No, sir.

Q. When you were at AIBC as president, were there any Brunswick officials who had anything to do with AIBC in terms of occupying officerships or other positions of trust?

A. There was a trust agreement of which an official of Brunswick was one of three trustees.

Q. Who was that official?

A. In the early trust agreement, I believe it was an attorney by the name of Ken Griffin.

Q. What was his relationship to Brunswick?

A. He was an employee.

Q. Do you know what his job was at Brunswick?

A. He was a lawyer.

Q. Was he working as a lawyer for Brunswick?

A. I believe so.

Q. And he became one of the trustees of AIBC prior to the bankruptcy?

A. It was a trust agreement that had three people administering, namely, the president of AIBC—

Q. That was you.

A. —an official of Brunswick—

[3693]

Q. That was Mr.—

A. Would you let me finish?

Q. No, I would like to get this in segment form. It had three officials?

A. Three officials.

Q. One was yourself, is that right?

A. The president of AIBC.

Q. Who was the next one?

A. It was an official of a bank in New Jersey, National State Bank.

Q. What was his name?

A. Mr. Marshall.

Q. You say there were three. Who was the third man?

A. Mr. Nieman—I believe it was Mr. Nieman.

Q. Who is he?

A. Mr. Nieman, he is an employee of Brunswick, an officer.

Q. May I ask you, sir, whether prior to the bankruptcy sale of AIBC you had any conversations with—Mr. Nieman, is it?

A. Yes, sir.

Q. —concerning the possible disposition of the 26 centers owned by AIBC at that sale?

A. No, sir.

[3694]

Q. None whatsoever?

A. No, sir.

Q. Did you have any knowledge of how much money was owed by AIBC to Brunswick before the bankruptcy?

A. It was better than $10,000,000.

Q. Do you know that to be so?

A. Yes, sir.

Q. Do you have any knowledge of the value of the 26 centers which had been owned by AIBC, prior to the bankruptcy sale?

A. The value?

Q. Yes.

A. Can you explain value to me?

Q. First, do you know what AIBC paid for them?

A. In total, the 26, I can't recall what the 26—because we had over 30 centers at one time. I don't remember specifically what we paid in total for the equipment; no, sir.

Q. Do you have any idea of the number of lanes that the 26 AIBC centers had?

A. I don't recall.

The Court: 26 centers, you mean?

Mr. Hoffmann: Centers.

A. I don't recall the number of lanes. I could start

[3695]

listing them now and put them together.

Q. You are not carrying that in your head, is that right?

A. Sometimes I try to put some things out of my head. I don't remember that. It wasn't important to me.

Q. Do you know whether or not, prior to the bankruptcy sale, in November of 1961, Brunswick sought to take over AIBC for a sum of money?

A. I have no knowledge of that.

Q. What were you in '61?

A. I was vice-president and general manager. My job responsibilities were to run the centers.

Q. You weren't told anything about an offer of $100,000 to buy AIBC?

A. No, sir.

[3696]

Q. But you did know something about a voting trust; you do know that?

A. Yes, sir.

Q. When did that voting trust start?

A. In the early 1960's. That was—I believe it was either '60 or '61.

The Court: Who were the trustees, you, Nieman, and who else?

The Witness: An official of the bank here in New Jersey, Mr. Augie Marshall. We weren't the original trustees.

Q. Now, sir, Mr. Marshall was the bank man?

A. Representative of the bank; yes, sir.

Q. And Mr. Nieman was the Brunswick man, is that right, on the voting trust?

The Court: Who was the receiver, do you recall?

The Witness: Mr. Sanford Silverman.

The Court: Silverman.

Q. Do you know how it came to pass that a Brunswick man was put on the group of trustees?

A. No, sir.

Q. You know nothing about it?

A. No, sir.

Q. Do you have any recollection of it?

[3697]

A. No, sir.

Q. In 1970 you were asked the following questions and gave the following answers:

"Question: The second trustee was to be designated by"—I am reading from page 2405—"The second trustee was to be designated by Brunswick and this position has been filled at all times by a Brunswick officer."

I was then reading from a document I held in my hand.

"That is correct, as far as you know?

"Answer: It was filled by a Brunswick employee. I don't know whether he was an officer of the corporation. I don't recall.

"Question: But it was filled by a Brunswick employee, is that your point?

"Answer: Yes."

• • •

[3710]

Q. Now, then, sir, do you have any way of knowing whether the only benefits given the Airborne Instrument league members are those to be found on the back of Defendant's Exhibits 51 and 52 for identification?

The Court: Why not let him look at them?

Mr. Hoffmann: Oh, sure. I believe they are the same, except for different names and signatories.

A. It is my understanding that that is all that has been given. That's what we warrant when we sign one of these.

Q. Do you have any way of knowing whether that is all-inclusive, whether or not at different points of time during the life of the contract there may not

[3711]

have been other benefits given?

A. There are ways of checking it.

Q. Do you know, here and now, on the stand?

A. No.

Q. You don't know. Now, you valued these benefits, didn't you, in your testimony on direct examination, you put a price on some of these benefits—turkeys per pair of lanes, bottles per pair of lanes, and so on?

A. Yes, sir.

Q. Did you put a price down for free games?

A. No, sir.

Q. Why not?

A. I didn't think they had any value as far as—to me, it is a redemption of only about 18 per cent. I didn't establish a value.

Q. Bowlers usually pay for bowling, don't they, at BCOD centers?

A. Yes, sir.

Q. When you give them a game free it is worth something, isn't it?

A. If they use it; yes, sir.

Q. If they use it, of course.

A. If they use it.

[3712]

Q. Now, is it your point that since you didn't know whether they used it or not, you didn't put it down?

A. I have no idea whether they used them or not.

Q. Was that your reason for not giving a price—

A. Yes, I have no knowledge.

Q. You say that a free game has no relevance, less relevance than a turkey at Thanksgiving; is that your statement?

A. No.

Q. Well, you say a turkey at Thanksgiving has relevance, don't you put it down here?

A. Yes, but we purchase the turkey and we hand it to the person, the slip.

Q. The free games you didn't have to purchase to give over to the bowler, is that right; is that the difference?

The Court: Answer, Mr. Rudo.

A. Yes.

Q. However, when the bowler bowls, he pays normally for the games which he bowls, doesn't he?

A. Yes.

Q. Whether they cost you anything or not; isn't that so?

[3713]

A. He pays for them when he bowls.

Q. So if you give him a free game, it is something of value to him, isn't it?

A. Something of value to him, yes.

• • •

Q. In the various estimates or conclusions that you described about prices in your direct examination today, did you make any allowance for those free

[3714]

games?

A. I don't understand the question.

Q. Maybe if it is read back slowly, you will.

(Record read.)

A. Prices in relation to what, sir?

Q. Prices for bowling at BCOD centers, they never go down; do they; wasn't that your testimony?

They only go up; isn't that your testimony?

A. The average price; yes.

Q. The average price, is that some special meaning, 49 point something cents, that you testified about before?

A. Yes.

Q. What kind of an average is that?

A. That's an average of the mixture of the different types of bowling, whether it be senior citizen, junior bowling, adult bowling at night, adult bowling in the daytime.

Q. How much did you take off from the 49 point, what was it?

A. 49.9.

Q. 49.9 cents for free games, anything?

A. No, sir.

Q. And you're talking about an average price of 49.9 cents, you are not talking about the price paid

[3715]

by the bowlers; isn't that so?

A. No, sir, it is the price that we collect.

Q. I thought we had agreed just a half minute ago that if a bowler pays 60 cents a game, and if he has one game free, and he pays for one game, he is really paying just 30 cents for each of two games; isn't that so?

A. I recorded 49.9 as the pay price. That we receive.

Q. Without allowance?

A. Without allowance; that's what I said.

Q. Now, could there be any particular promotions that Brunswick has which you didn't have reflected in the 49.9 cents?

A. Yes.

Q. For example, how about complete breakfast in California; did you take those into account when you are figuring price?

A. They are not part of the 49.9.

• • •

[3728]

Q. Sir, do you know here and now every inducement given by Sunset in 1965 from your own memory sitting here on the stand?

A. I think I do.

Q. Can you without reference to this contract tell us what they were?

A. Without reference to this contract?

Q. Yes, from your mind, from your memory.

A. Trophies for the first place, second place and third place teams; high game, high average, high series for men and women; eligibility in the national tournament; eligibility for awards program; dollar for a buffet at the end of the year; a dollar rebate per bowler; a bottle a pair; a turkey a pair.

Q. Anything else that you can think of?

A. And a drink at Christmas.

Q. Anything else; does that exhaust your recollection?

A. That's it.

Q. What is a summer coupon book?

A. Summer coupon book is ten games given to the bowlers to be bowled one per week for a ten-week period beginning after the league season.

[3729]

Q. No extra charge for those, those are thrown in, free games, is that right?

A. That's right.

Q. Now, sir, you didn't seem to remember in your listing the existence of the summer coupon book. Bowl-Your-Way-To-Europe, did I understand that your testimony, in answer to a question of Mr. Seeley, was that it was in formation in the Spring of '65; was that your testimony?

A. That's right.

Q. Do you have any recollection as to when it went into effect?

A. We had a tournament in 1965, a national tournament.

Q. Yes. And do you know when the tournament started?

A. In the name of Bowl-Your-Way-To-Europe, it started in—this is the eighth year, so it is eight years previous to this year. This is the eighth year.

Q. That brings it back to what year, '65?

A. '66, '67, '68, '69, '70, '71, '72, '73.

Q. '65?

A. Yes.

Q. Do you know when in 1965 it began?

A. I think it commenced with the leagues that bowled in the winter of 1965.

[3730]

Q. With the leagues that bowled in the winter—

A. 1965.

Q. This contract for Airborne Instruments, that was for a period of 32 weeks commencing September 13, 1965, and ending April 25, 1966, isn't that so?

(Document shown to the witness.)

A. That's correct.

Q. Didn't Bowl-Your-Way-To-Europe make all these Airborne Instrument league members eligible for participation?

A. Yes, sir.

Q. Wasn't that another benefit which members of that league achieved by bowling with Sunset Bowl?

A. I put it in the $50 amount that I said for the awards.

Q. While you were doing that, there were some items which I thought might have some value. I wonder if you

considered those. "The monthly winners in each classification will receive a plaque recognizing them as a winner in their classification with their achievement properly inscribed."

How much did such a plaque cost?

A. Maybe $1.25.

Q. That is an item, however, of benefit to the participant who wins, isn't that right?

[3731]

A. That's right. That's spread out all over the house, all the leagues in the house.

Q. This is a plaque which recognizes them as a winner, and it says, "The monthly winners will receive" such a plaque.

A. But not monthly winners from every league, sir.

Q. Well, each winner's name will be placed on the Bowl-Your-Way-To-Europe tournament wall display in the bowling center, that's the second thing, isn't it?

A. And that's a visible display—

Q. That is what you are talking about, a visible display, isn't it?

A. Yes, sir.

Q. But he also takes home a plaque, doesn't he, the winner?

A. That's two winners a month from all the leagues.

Q. But each winner takes home one, doesn't he?

A. The winner for that month. There are only two winners out of all the bowlers.

Q. You said that. Each one of those takes home one, doesn't he?

A. Yes. $2.50.

Q. Now, sir, how many people in the course of the year go to Washington in connection with—

[3732]

A. Two.

Q. How many people go to Europe in connection with it?

A. Four.

Q. The four are the husbands and their wives, or their wives and their husbands?

A. That is correct.

Q. Did you, in your calculations as to the value of this tournament, or promotion, include the $500 cash which is given to the traveller to Europe?

A. It is part of the $50.

Q. You didn't mention it this morning, did you, in your testimony?

A. I thought I said the entire awards program. I don't recall.

Q. So if you go, you get, in addition to a free trip to Europe, you get $500 in cash, don't you?

A. If you are from that league.

Q. If you are from what?

A. The league.

Q. You mean each sanctioned league bowler bowling in a sanctioned league that qualifies for the BCO awards program, is that what you mean by the league?

A. Well, there are 160 bowlers in the hypothetical

[3733]

case in this league, sir. They might not have had a winner.

So there was no money expended for this league.

Q. What league are you talking about when you say, "this league"?

A. The hypothetical league.

Q. Are you talking about Airborne Instruments now? You don't know whether they had one or whether they didn't.

A. No.

Q. They were a sanctioned league, able to be eligible for Bowl-Your-Way-To-Europe, weren't they?

A. That's right. The $500 comes for the final, at the end. That is given to the two ultimate winners that go to Europe.

• • •

[3737]

Q. Sir, I asked you before the recess as to whether or not you recalled any attempts to buy AIBC in 1961.

A. Yes, sir.

Q. And what was your answer?

A. I do not recall any attempt, no knowledge.

Q. Ultimately all of the AIBC centers came into the hands of Brunswick, didn't they, at the bankruptcy sale?

A. Not all at the bankruptcy sale.

[3738]

Q. All but one, isn't that right, at the bankruptcy sale?

A. That's right.

Q. And the one exception was Mr. Vitolo's premises, isn't that right?

A. That is correct.

Q. That came back to Brunswick very soon thereafter, didn't it; how long after?

A. Approximately a week.

Q. And in order to make sure that that went back to Brunswick in approximately a week, didn't you call Mr. Hanigan, the head of the company, at 11:00 o'clock at night?

A. I called Mr. Hanigan, but not to make sure that that came back into the AIBC—I mean to Brunswick.

Q. How about the timing, was it 11:00 o'clock at night?

A. Yes, sir.

Q. It had nothing to do with this acquisition?

A. Mr. Vitolo asked me if Brunswick was interested in purchasing.

Q. And at 11:00 o'clock at night you called the head of the company to find out whether they were interested in purchasing; is that your testimony?

A. 11:00 o'clock in the Eastern zone or in the

[3739]

Central zone, Mr. Hoffmann?

Q. My dear friend, you know better than I. I didn't place the call.

A. I placed the call from New Jersey. It was 11:00 o'clock here and 10:00 o'clock here in Chicago.

Q. And was Mr. Hanigan in Chicago at 10:00 o'clock at night?

A. Yes, sir.

Q. Do you normally transact business with Mr. Hanigan at 10:00 o'clock at night?

A. I was told to call Mr. Hanigan that night at home.

Q. Regardless of the hour?

A. Yes, sir; I was told to call him.

• • •

[3790]

Q. ° ° ° Now, you are the vice president in charge of bowling operations; is that right?

A. That's right.

Q. Do you have under your powers, supervision, the sale of Brunswick operated bowling centers?

A. No, sir.

Q. Do you have anything to do with that matter?

A. No, sir.

Q. Do you know anything about any formula used by Brunswick for the purpose of quoting a price for its operated centers?

A. I am not familiar with the exact formulas.

Q. Do you know in exactly what the formula is, in an approximate way?

A. I believe that the history of the center is recorded, the forecast for ten years is made, and there is a multiple of cash flow performance that's used.

Q. Do you know how the forecast is made for the future?

A. No, sir.

Q. Do you know what the multiple is?

A. No.

Q. You are not in a position to offer any

[3791]

bowling centers for sale from the witness stand, are you?

A. No, sir.

Q. Now, you paid, that is to say, Brunswick paid in $450,000 at the AIBC sale, is that right, for the AIBC centers——

A. It was approximately that.

Q. And that was for 25 centers?

A. Yes, sir.

Q. Can you come along with me in a little arithmetic. I don't have my computer here.

25 into 450, I get $18,000 a center.

Can you do that in your head; does that jibe with you?

A. No, sir.

The Court: What did you ask him, if he could do it in his head? You didn't.

Mr. Hoffmann: I wasn't testifying, your Honor.

Q. But, sir, you got the last one, the 26th one, by

paying Vitolo $5,000 over what he paid in effect; isn't that so?

A. No, sir.

Q. You're saying "No, sir."

Vitolo bought a center; isn't that right?

[3792]

A. Yes.

Q. You know that?

A. Yes.

Q. At the AIBC sale?

A. Yes.

Q. And then Brunswick bought it from Vitolo, you know that; isn't that so?

A. I know that.

Q. And Vitolo, according to the testimony, was given the fruit of the operation for a week or about a week of the center; do you know that to be so?

A. What do you mean by "fruit"?

Q. He was given the money, the receipts, for the week.

A. Yes.

Q. You know that was about $5,000?

A. It would have been. I'm not sure.

Q. If it could have been, isn't that then $5,000 which Vitolo received above what he paid for the center; isn't that right?

A. I never calculated it. I don't know.

Q. Well, did you, you, Brunswick, pay Vitolo back for what he put in for the center?

A. We paid him the $18,000.

Q. He held onto $5,000; isn't that so?

[3793]

A. He held onto the receipts for the period of time that he operated.

Q. With Brunswick's approval?

A. It was part of the documentation, yes.

Q. That's Brunswick's approval, is it not?

A. It was part of the agreement.

Q. Will you please answer my question. Didn't Brunswick approve that transaction, that he should hold on to the receipts for a week?

A. Yes, sir.

• • •

[3795]

RE-DIRECT EXAMINATION.

By Mr. Seeley:

Q. Do you know, Mr. Rudo, for approximately how many dollars AIBC was indebted to Brunswick at the time of the bankruptcy sale?

A. I believe it was better than $10 million, sir.

• • •

[3929]

KENNETH BROOKS ABERNATHY

CROSS-EXAMINATION.

By Mr. Hoffmann:

Q. Now, do you have any idea in millions of dollars what revenue Brunswick received from operating domestically its bowling centers?

A. Yes.

Q. And what is that figure?

A. I would estimate last year it reached the proportions of six or $7,000,000.

Q. And all of bowling, you say, is approximately one-third of the total revenue of the Brunswick organization?

A. Very roughly.

[3930]

Q. What is the total revenue of the Brunswick organization, very roughly?

A. About, I think last year, was in the vicinity of $35,000,000, after taxes.

[3931]

Q. Before taxes?

A. After taxes.

Q. Before taxes what was the revenue?

A. Before that, just roughly double that.

Q. Now, sir, do you know of any plans that Brunswick has to phase itself out of the bowling operating division, to get out of it?

A. No, unless they could sell them.

Q. Unless they can sell what?

A. Sell the bowling centers.

Q. How many people, if you know, work in connection with Brunswick's operation of domestic bowling centers?

A. I would estimate several thousand.

Q. Are they all looking for new jobs, do you know?

A. Not to my knowledge.

Q. Are there any which have insurance of permanent employment at Brunswick?

A. As much as any of us do, I believe.

Q. Do they partake of Brunswick's pension plans and the like and other employment benefits?

A. I think they do.

Q. They are not there as temporary employees, are they?

[3932]

A. Indeed, sir, over all these years since your first acquisition in May 1964 you succeeded in selling seven centers, isn't that right?

If you know.

A. I'm not sure, but I think that could be right.

Q. A lot of people in Brunswick are living on the assumption that you are not going out of the bowling operating business in the States, isn't that so?

A. That may be.

Q. Are you one of them?

A. I don't think so. I don't believe we will be going out of the bowling business.

• • •

RE-CROSS-EXAMINATION.

[3938]

Q. Now, do you agree with Mr. Hanigan that the bowling business is a good business, the bowling operating business?

A. Yes, it can be a good business.

Q. Well, is it a good business for Brunswick now?

A. Well, it is very difficult to salvage the bad centers but—

Q. Is it a good business now for Brunswick?

[3939]

A. I think it is.

• • •

[3986]

JOSEPH A. RICE, called as a witness on behalf of the Defendant, having been duly sworn, testified as follows:

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[3992]

DIRECT EXAMINATION.

By Mr. Seeley:

Q. Mr. Rice, by whom are you employed?

A. Brunswick Corporation.

Q. In what capacity?

A. I am corporate credit manager.

Q. When did you first go to work for Brunswick Corporation?

A. 1959.

Q. Will you please trace the various positions which you have held with Brunswick Corporation and state generally what your duties were in each of those positions?

A. I started with the company in 1959 as a zone accounts manager. That was the collection of bowling receivables.

In 1961 I became regional manager responsible for a greater area.

In 1963 I became the national accounts credit manager responsible for collection of major chain accounts.

In 1965 I became operations manager for Latin America and the Far East——

[3993]

The Court: Can the jury hear him?

A. (continuing) Responsible for our operations in those areas.

In 1967 I became manager of credit and collection services in the home office, responsible for our trade receivables.

In 1968 I became corporate credit manager.

Q. Were all of those positions that you have described in connection with credit?

A. Yes.

• • •

[3994]

Q. Was it and is it the regular business practice of the Brunswick Credit Department to keep a file of conditional sales contracts for bowling equipment and extension agreements made in connection therewith?

A. Yes.

Q. And was it and is it the regular business practice of Brunswick Corporation to maintain ledger cards or ledger sheets with reference to each installment equipment sale account?

A. Yes.

Q. And was it and is it the practice of the Credit Department to keep in the file also correspondence or internal memoranda relating to the account?

A. Yes.

• • •

[4011]

Q. Would you please, if you can, from the same sources give a history of the equipment contracts for Pueblo Bowl-O-Mat?

A. Brunswick sold 40 lanes and pinsetters to Pueblo Bowl-O-Mat, and equipment was installed in August 1960.

The lane contract was sold for $208,942 and with a down payment of 31,341, and a finance charge of 25,308 or deferred balance of $202,908.

[4012]

It was to be paid in 40 payments of $5,073 each on a seasonal basis, with the first payment due in October 1960.

The account paid current through January 1962, and there were no payments from January 1962 through March 1964.

The account was rescheduled in July 1963. The balance at that time was $142,036. The additional finance charge was $35,576. The new deferred balance was $177,612. It was to be paid in 64 payments of $2,775 on a seasonal basis with the first payment due January 1964.

The total delinquency that we deferred at that point was $76,091. The account was carried delinquent on a 60- to 90-day basis from January 1964 to October '64, was maintained current to November '65, and then it was paid in full in February 1966.

Q. If you can do the same thing now, please, for the——

A. I haven't finished the pinsetter contract for Pueblo.

Q. I'm sorry. I didn't mean to interrupt you, sir.

A. We sold 40 pinsetters to Pueblo Bowl-O-Mat. The selling price was $330,480. The down payment was

[4013]

$26,480. The finance charge was $79,040, leaving a deferred balance of $383,040. It was payable at 12 cents a line, with minimums during the winter months of $5,000 and during the four summer months of $2,000.

The first payment was due October 1960. The account paid $61,176 to December 1961 and was delinquent $1,824 at that time.

There were no payments from December 1961 through October 1963 and the delinquency reached $82,824. The account was rescheduled in July 1963. The balance at that time was $321,862. The additional finance charge of $19,131 was added, leaving a deferred balance of $340,993. It was to be paid in 64 payments at $5,328, with the first payment due October 1963.

The account paid October 1963 through August 1964 $21,312 and was delinquent at that time the same amount,

$21,312. The delinquency was paid in 1964, and maintained current and paid in full in February 1966.

Q. Does that finish with Pueblo?

A. With Pueblo, yes.

Q. Belmont Lanes, please, in Pueblo.

Mr. Seeley: Your Honor, I wonder if I could

[4014]

be getting something photostated that I am going to need to use in a few minutes.

The Court: Mr. McNeill or Mr. Dwyer, will you take that to the Clerk's office to have copies made.

(Mr. Dwyer leaves the courtroom.)

Q. Proceed.

A. Brunswick sold 24 lanes and pinsetters to Belmont Lanes. They were installed in 1962 on a combination contract. Both the lanes and pinsetters were on one contract. The cash sale price for this package was $352,229. The finance charge was $88,761. The down payment was $35,225, leaving a deferred balance of $405,765. It was to be paid in 64 seasonal installments over eight years at $6,340 each, starting October 1962.

They paid $1,096 in October 1962 and the account was rescheduled to start with payments in March 1963. No payments were received. The account was rescheduled to start again in October of 1963, spreading the March, April and May installments over the remaining part of the contract. It was payable in 61 installments at $6,634 payments. No payments were received and the account was rescheduled in December 1963, payable in 64 installments at $7,109, with payments to start in

[4015]

October 1964.

The account was repossessed in January 1965. The balance was $454,952.

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[4049]

CROSS-EXAMINATION.

By Mr. Hoffmann:

• • •

[4060]

Q. Now, the policy, you said, of Brunswick was not to discriminate?

A. Yes.

Q. When you speak of a policy, you are talking

[4061]

about what you described, aren't you, there are times when Brunswick will forbear collection; isn't that so?

A. Yes.

Q. There are times when Brunswick will insist on collecting; isn't that so?

A. Depending on circumstances, yes.

Q. And one of the things that affects the judgment in making that decision is what you call verified need?

A. Yes.

Q. Those are your words, aren't they?

A. I think they are Mr. Abernathy's.

Q. Does that mean that if we have center A, and the manager of center A says, Look, Brunswick, I am a very poor man, I have got five kids, seven grandchildren, I want to send my children to college, I am a very poor man.

Look, let me show you that I am poor. You can verify that.

Does that mean that where he shows you his need that he really is hard up for money, that you will extend credit to him?

A. That was only one of the factors.

Q. That's what is meant by "verified need"?

A. I said that was only one of the factors.

[4062]

Q. That is a factor?

A. Yes, but also capacity and capital.

Q. Come with me along this path: At the same time—

The Court: Off the record.

(Discussion off the record.)

Q. At the same time in the same town there is center B, in the same town, the manager says to the Brunswick representative, I am a bachelor, I run some sports cars, I like to gamble a little, I spend my money as much as I can get, and I am trouble on my bill to you, and I need an extension of time.

Is that what you mean by "verified need"?

A. I wouldn't say so.

Q. You mean you make a judgment as to the kind of need, if center A can persuade you, whether it is grandchildren or what, that this is a good situation for you to help out, an element of judgment would be his need has been verified, we will help him out, but if center B doesn't seem to be so nice a guy, you don't like what he does, the way he spends his money, that you won't extend it for him; is that the meaning of what you are talking about when you talk about "verified need"?

A. That was a pretty long question.

[4063]

Q. I think you followed with me, didn't you?

A. Well, verified need was only one of the elements. Being a nice guy is——

Q. Isolating that element of "verified need."

Mr. Seeley: I think you can have a medium long answer to a very long question.

Mr. Hoffmann: I don't see any reason for that on cross-examination.

I will be guided by his Honor.

The Court: Do you remember the questiou?

(Record read.)

The Court: Anything further to say?

The Witness: Well, first of all, we wouldn't consider verified need on the individual. We are talking about a business, I assume.

When we refer to verified need, we are referring to the capacity of the business to pay or not to pay.

By Mr. Hoffmann:

Q. These centers are generally not publicly owned corporations, are they, these independent proprietors?

A. I think our records would show that 60 to 75 per cent of our customers were corporations.

Q. But not publicly owned corporations; isn't

[4064]

that so?

A. That's probably true.

Q. Some are, of course.

A. Yes.

Q. Where it is not a publicly owned corporation then chances are it is a family unit, isn't it, family group that's got a center going?

A. Normally there would be various groups of investors, not normally a family.

Q. Well, sir, aren't there individuals who run these bowling centers?

A. Of course.

Q. Partners who run the bowling centers?

A. Yes.

Q. So in order to answer my question, let's not bring in the corporations, let's keep them out, shall we?

A. Most of the businesses were corporations.

Q. Address yourself to the lesser part of your business, which is not with corporations, but with individuals.

Now, you have verified need. You say you have a policy of nondiscrimination.

Can you explain to me to the extent that you considered in your judgment as to forebearance of

[4065]

repossession the verified need of the center, can you explain to me whether you have a policy that uniformly applies verified need to all comers?

A. I tried to explain. Verified need is only one of the elements.

Q. I'm just asking you about that one element.

A. And probably wouldn't apply to what the man's personal problems are. If—we were talking about the business and what the need would be for the business and what the cost would be if there was a verified need to pay on any refinance basis.

Q. Now you are concerned with capacity to pay; is that right?

A. Yes.

Q. Is that the same thing that you are talking about when you talk about verified need?

A. No.

Q. Let's confine ourselves, if we may, to verified need. What do you mean by it?

A. Well, what we really mean is that we wouldn't extend an account unless there was a need to be extended, if the business was making money, and compared its installments, we would not consider him for

[4066]

an extension, if they would show us that the business would not produce enough cash at this particular point in time to meet the installments due to our company then we would consider an extension.

Q. Is it fair for me to infer from what you just said that the worse the fellow's business, the better his chance of getting an extension of time; isn't that what you just said?

A. Not necessarily. That would be the first criteria. You'd have to have a verified need.

Q. He has to be in pretty bad shape, is that what you mean, to get an extension?

A. He'd have to have a need before we could consider him for an extension.

After he has a need then we have to investigate his capacity to pay on a refinance schedule.

Q. Do you in considering this so-called verified need ask the independent proprietor, customer of Brunswick, to supply you with information as to how he uses all his income?

A. Yes.

Q. Does that go into his personal affairs as well as into his business affairs?

A. Well, it would depend on whether he was running the company as a proprietorship or as a corporation.

[4067]

Q. For the purpose of this line consider only a fellow who runs it as a sole proprietor.

A. Then we would examine—we examine the business, and for instance, what kind of salary he was paying himself.

Q. If the way he spends his money met with your approval and the need seemed to be there, this would be a factor which would lead you to extend credit; is that right?

A. To consider an extension.

[4068]

Q. Consider it; it is one of the factors; isn't that your testimony?

A. Yes.

Q. Now we turn it around.

A. Pardon?

Q. Now we turn it around, that a proprietor shows that he is making a lot of money, he has got real estate in his own name, has got a good balance in the bank, seems to be quite successful. But he owes you money.

And you look at his books and you learn that he hasn't been paying you simply because—not because he can't, but because apparently he doesn't want to, he wants to put the money to some other use.

Have you run across such a case?

A. Yes.

Q. Does he get credit extended to him?

A. No.

Q. So the criteria you use in deciding whether or not you should extend credit is—at least in this area of your performance—is a judgment, isn't that right, about an in-

dividual, and how he conserves or wastes his money; doesn't that follow?

A. No, I don't think that follows.

Q. Why not?

[4069]

A. It is based on what the business produces, it is not—

Q. I gave you the two cases. I gave you the case—

A. You changed it.

Q. I gave you the case of the wealthy wastrel; he doesn't get it; and I gave you the case of the poor man that's trying hard, but his business is unsuccessful. He gets it; isn't that your statement?

A. I don't think your second example is what you just summed up.

Q. In any case, without going through all these hypothetical situations, a judgment is made, is it not—

A. Yes.

Q. —by particular people who have the responsibility—

A. That's true.

Q. —as to whether or not they will extend credit to a particular bowling proprietorship; isn't that so?

A. That's true.

Q. Now, as to that judgment in this area of need, verified need, is there any objective policy which is applied?

[4070]

A. I didn't understand the question.

Mr. Hoffmann: Maybe the Reporter may read it back.

The Court: Read it back, Mr. Bremer.

(Question read.)

A. Well, that is the policy. The first thing is to establish a need.

Q. But decisions are made as to need in terms of particular factors; they haven't been listed anywhere, have they: This is the kind of factor we list here which will lead us to say: No extension of credit; this is the kind of factors that say: Extension of credit; do you have such lists?

A. There were practices, guidelines. Guidelines, practices—

Q. Do you have such with you?

A. No.

Q. The policy that you are talking about today, is that all summed up in pieces of paper somewhere, guidelines?

A. The policy; yes, the policies we have. We have policies. That's really what I mean, policy or guidelines, procedures, yes.

Q. You have that all typed out, printed out, for use by people who extend credit?

[4071]

A. That's right.

Q. Do you know where that can be found?

A. Yes, I have a copy of the manual in my office.

Q. Do you have it with you?

A. No, I don't have it with me.

Q. Do you have it written in the tablets of your memory?

A. No, not entirely.

Q. You have been using it a long time, haven't you?

A. It is not committed to memory.

Q. What do you do whenever you are going to extend credit, do you look it up somewhere?

A. Oh, I understand the meaning of—

Q. You understand the policy, is that right?

A. Yes.

Q. What is the policy about c.o.d.?

A. When a customer lacks capacity, the character, the capital to pay his debts, we put him on c.o.d., in general.

Q. The four C's?

A. There are three there, yes.

Q. The three C's. Did you ever hear of any of your customers who were paid in full, except for some insubstantial amounts, being put on c.o.d.?

[4072]

A. Being paid in full has nothing to do with capacity or capital.

Q. Oh, do you have so many customers—who over the 1960's paid you millions of dollars, and it has nothing to do with whether or not they go on c.o.d.?

A. A lot of—

Q. Where is that policy written down?

A. There are a lot of customers. What policy?

Q. Do you have a c.o.d. policy that is written down?

A. There is a policy—

Q. When you put a man on cash on delivery, do you have something that is printed that says when to put him on cash on delivery?

A. When the credit manager makes a judgment that he can't pay—can't or won't pay.

Q. Do you know of any examples of people being put, or proprietorships being put on c.o.d.?

A. Yes.

Q. Was the plaintiff one?

A. I don't know about that.

[4073]

Q. You didn't hear that the plaintiff was put on c.o.d.?

A. I know that he was, but I directly do not know.

Q. What?

A. I was not involved directly at that time.

Q. You weren't directly involved?

A. Not at that time.

Q. Do you know where it was written that the plaintiff should be put on c.o.d., in the policies of the company; was it up on the bulletin board somewhere: All people who pay many millions of dollars to Brunswick bowling centers should be put on c.o.d.; was there anything like that put up on bulletin boards?

A. Certainly not.

Q. On big printed documents, or pieces of instruction sent around amongst the Brunswick credit people?

A. Of course not.

Q. Anything like that?

A. No.

Q. No. There was some formulated policy somewhere about that, however, is that your point, nondiscriminatory?

A. Nondiscriminatory.

Q. How many people did you put on c.o.d.?

[4074]

A. I really don't have a number.

Q. Do you know of anybody who was put on c.o.d. who paid as much money to Brunswick as did the NBO?

A. I'm sure there are examples.

Q. You are sure there are, but you don't know what they are?

A. No.

Q. Sir, would you come this far with me, that if somebody owes Brunswick a lot of money, and somebody has paid all he owes to Brunswick, it would be discriminatory to put the man who has paid the money on c.o.d. and not put the one who didn't; would you come that far down the road with me?

A. No, I would not. What——

Q. It is nondiscriminatory?

A. What has happened in the past has nothing to do with what might happen in the future. Credit is extended on what might happen in the future.

Q. Was there any indication that Dan Lieblich was going broke, after he paid Brunswick?

A. I don't think he was better off. All he did was transfer the debt from Brunswick to a bank.

Q. Do you know that?

A. Yes, I do.

[4075]

Q. Wouldn't that have been a welcome prospect for Brunswick, for most of its customers—during the '60's—that they pay Brunswick in full and owe a bank?

A. Absolutely.

Q. Wouldn't that improve their credit status with Brunswick rather than disimprove it?

A. Not necessarily. One has nothing to do with the other.

Q. You mean a man doesn't enjoy good credit with Brunswick by paying his bills?

A. It's a factor. It is one of the factors we use. Experience certainly is one of the factors that we use.

Q. The experience of paying bills——

A. That's right.

Q. —and paying in full. Do you know how many millions of dollars NBO paid Brunswick, do you have any idea?

A. Approximately.

Q. How much?

A. I'd say about five million or something like that.

Q. Do you think more?

A. Possibly.

Q. How about six?

A. I don't know.

[4076]

Q. Will you take seven?

A. If you give it to me.

Q. A man pays $7 million to Brunswick, that doesn't improve his credit status over a man who doesn't pay Brunswick a dime, is that your testimony, is that what you want this jury to believe?

A. It would depend on the other man—what he owed.

Q. If he owes a lot of money, the other man, he owes $5 million, and he is not on c.o.d.; the nondiscriminatory policy, is that what you are saying?

A. The other customer is—I don't understand the hypothetical. You will have to repeat it.

Q. You don't understand the hypothetical?

A. No.

Q. Do you want me to spell it out for you?

A. Yes.

Q. There exist two people. We will call the first one

A. A owes Brunswick $5 million for pinsetters and lanes, all right?

A. Right.

Q. B has paid Brunswick $5 million for pinsetters and lanes, doesn't owe them money for pinsetters and lanes. Okay?

A. Yes.

Q. Now, it is B that is put on c.o.d., cash

[4077]

on delivery; A is not put on c.o.d. My question is: Is that nondiscriminatory?

A. You haven't given me enough facts—

Q. More facts are needed?

A. Wait a minute. You haven't given me enough facts in either the A or B case to make a decision on it.

Q. It is not enough that you be paid; you can pay in full and still get cash on delivery; is that your testimony?

A. It would be one of the factors. There are many factors involved in determining whether you are going to extend credit or not. Experience—

Q. Such as to bring a lawsuit against Brunswick, that would be a factor, wouldn't it?

A. Yes.

Q. And wasn't that a factor that was used here?

A. I don't know.

Q. Such as running an advertisement in the Wall Street Journal that "We are using AMF equipment," is that a factor for putting somebody on c.o.d.?

A. I would say no.

Q. What?

A. No.

Q. Do you know what happened to Fair Lanes?

[4078]

Do you know why they were put on c.o.d.?

A. Yes, I do.

Q. They came off it after a while, didn't they?

A. Yes, they did.

Q. How long were they on it?

A. I couldn't tell you the exact time.

Q. A matter of years?

A. Probably.

Q. Do you know what the occasion of their coming off c.o.d. was?

A. Yes.

Q. What was that?

A. They renegotiated a sale to them, on credit terms.

[4079]

Q. They bought some more equipment, didn't they, a sizeable amount?

A. Yes.

Q. Isn't that what happened?

A. Yes.

Q. And that was reasonable, taking them off c.o.d. and giving them credit. Now, they are going deeper into debt, unless they pay you cash, isn't that so?

A. You are selling equipment during the years when they paid cash. We negotiated a credit transaction.

Q. It was a day or two after, I put it to you, an advertisement appeared in the Wall Street Journal about Fair Lanes, that they were favoring AMF, that they went on c.o.d., isn't that so?

A. I assure you that advertisement had nothing to do with AMF going on c.o.d.

Q. You are familiar with the advertisement?

A. I am very familiar with it.

Q. You testified this morning about Belmont in Pueblo and Imperial Bowl, didn't you, in Fort Lauderdale, among other things, you testified about Pueblo—Belmont Bowl in Pueblo, and Imperial Bowl in Dania, Florida, is that right?

A. Yes.

[4080]

Q. Addressing yourself first to Imperial Bowl—

A. To which?

Q. Imperial. You have your records there, don't you?

A. I know, but you are talking about Pueblo and Belmont.

Q. I am going to ask you questions about both, so you might as well keep both out.

A. Okay.

Q. Do I understand correctly, from just a glance at your record, that for the lanes at Imperial Bowl the down payment in cash was 7.3 percent?

A. Yes, that is correct.

Q. Do you know what the normal down payment is?

A. I am not sure——

Q. I supply the suggestion that it is 20 percent; does that jog your recollection?

A. What you are saying, that we had a minimum, or something?

Q. I am not saying any such thing. Isn't the normal down payment required in a lanes contract a down payment of 20 percent?

A. As you suggested, we would rather have cash for the whole thing, and then we start to negotiate from there.

[4081]

Q. Is there no such thing as a normal down payment for lanes, is that your testimony, Mr. Rice?

A. I would say, "normal," wouldn't be the right word, maybe, "average."

Q. What is the average?

A. I really couldn't tell you.

Q. You don't know?

A. No, I don't.

Q. Is it more or less than 7.3 percent?

A. I would say for this period it would have been more.

Q. Would have been more.

So that if proprietor A buys lanes, on the average he pays more than 7.3 percent in cash as a down payment; that is the meaning of your testimony, is it not?

A. Yes.

Q. Now, as to pinsetters at Imperial Bowl, just a glance again at your records suggests that Brunswick paid the sales tax, is that right? Do you have the records in front of you?

A. I don't know that I could tell that from the records.

Q. We thought we could when we looked at it.

A. We paid the sales tax?

Q. That's the way it looked to us.

A. Well, I am sure we didn't.

[4082]

Q. Talking about Imperial Bowl and the automatic pinsetters?

A. I don't think I really have anything here that shows that, I mean would show it one way or the other. I don't know what you looked at that made you—this is the file (indicating).

Mr. Hoffmann: Would you have any objection, Mr. Seeley, if I move forward my questioning and ask Mr. Lieblich just to look at this?

Mr. Seeley: No.

(Mr. Hoffmann and Mr. Lieblich confer.)

Mr. Hoffmann: I will put this sales tax matter to to one side for the moment.

[4083]

Q. This Imperial Bowl matter, the contract was January '62, is that right?

A. I don't have my records.

(Records handed to Mr. Hoffmann by Mr. Lieblich, then to the witness.)

Q. Can you tell from the records, without too much strain, when the contract was entered into; January '62, is that correct?

A. Well, the conditional sale contract for—the execution date or installation date?

Q. What date do you have?

A. Well, the note was executed on December 26, 1961.

Q. And is it for performance during '62?

A. Yes, it was installed in February of 1962.

Q. Now, if you look at it, was there any payment required until October of '62?

A. No.

Q. Not until October. Do you know what is normal when somebody purchases pinsetters and lanes, does he normally get ten months before he has to pay, under the contract?

A. Well, four of those months we don't require any payments, June, July, August and September, and sometimes we don't require payments in May. But normally, the contract starts 30 days after installation.

[4084]

Q. And this isn't the normal thing, then, is it?

A. No.

Q. No. So, here we have a difference in extension of credit, do we not, between this contract and the normal contract; any policy written in fire on the walls of Brunswick as to that?

A. Well, the installation was in February of—

Q. Beg your pardon, sir?

A. I said the installation was in February of '62, so the normal starting date might have been like April 1st.

Q. Not like October 1962?

A. Well, then one payment would have been made in April and the next one might have been due in September.

Q. The center, however, opened in January of '62, did it not?

A. Not according to the information I have here.

Q. What is your information there?

A. I have an installation date and a sign-off sheet on the pinsetters. All I can show you here is that the payment—

The Court: A little louder.

A. (continuing)—all I can show you from what I have here is that the payments for the pinsetters—that

[4085]

they were installed in February and the payments started in March.

Q. Let me see that, please.

A. Sure.

(Shown to counsel.)

This is the beginning document and that was the first payment.

Q. Is this Imperial Bowl?

A. Yes, it is.

Q. What about the contract?

A. The pinsetter contract—the contract here says that the first payment was due March 5th.

Q. Well, sir, did you follow me too far down the road when you spoke of October? Where did you get that date?

A. The October date is for the lane contract.

Q. The lanes?

A. Yes. The pinsetter is paid on a year around basis.

Q. So we have suddenly gone from lanes to pinsetters. Sorry about that. I thought we were talking lanes.

A. You asked me about the installation date and the only way——

Q. About lanes is all we have been testifying about. As to lanes, it still remains October, the pay-

[4086]

ment, doesn't it?

A. That's true.

Q. That's true. So what you just had to say about pinsetters can be disregarded in connection with your testimony about what is normal and lanes, and so forth, isn't that right?

A. Well, you asked——

Q. You have two contracts, one for lanes and one for pinsetters, haven't you, there?

A. That's true. You said they were installed in January. And I said the record shows——

Q. Sir, I am only talking about lanes. Lanes is October, isn't that right?

A. The first payment——

Q. Whatever it may be for pinsetters?

A. The first payment date is October, that's correct.

Q. And the normal practice would have been for an earlier payment on the lanes, isn't that equally correct?

A. Yes.

Mr. Hoffmann: Thank you.

The Court: A five-minute recess, members of the jury.

(Short recess.)

[4087]

Q. The policy you say was not to discriminate in the giving or withholding of credit; is that right?

A. I didn't hear what you said.

Q. The Brunswick policy was not to discriminate in the giving or withholding of credit, is that right; that was your testimony?

A. Yes.

Q. Tell me, sir, do you know from your records how much Belmont paid, Belmont Lanes in Pueblo, California–Colorado, for the period 1962 to 1965?

(Record read.)

Mr. Hoffmann: Let me withdraw the question simply because of the California-Colorado——

The Court: I don't think Belmont paid Belmont Lanes. That's what I am objecting to.

Mr. Hoffmann: If that's what I said, that's wrong, your Honor.

The Court: I knew you weren't listening.

Mr. Hoffmann: I was listening; I didn't hear that. That was so preposterous it didn't even register in my ear drum.

Q. Do you know, Mr. Rice, how much Belmont paid to Brunswick——

The Court: That's better.

[4088]

Q. —for the period 1962 to 1965 for pinsetters and lanes?

A. I testified that they paid $1,096 in October 1962 and that they repossessed in 1965 without any other payments.

The Court: Repossessed when?

The Witness: 1965, in January of 1965.

Q. One thousand and how many dollars?

A. 96.

Q. $1,096 in October 1962, and that's all Belmont paid in those three years?

A. Yes. That's not all they paid, they paid on some open account purchases.

Q. I didn't hear you.

A. They paid on some open account purchases over that period.

Q. Things like the balls?

A. Yes.

Q. Gloves, shoes, maybe?

A. Yes.

Q. When Bowl-O-Mat, Pueblo, paid in full in January 1966, how much did Belmont owe at that time?

A. Belmont had been repossessed in January of 1965.

Q. It was already in the hands of BCOD, wasn't it?

[4089]

A. Yes.

Q. Do you know how much it owed at the time of repossession?

A. $454,952.

Q. Do you know how much Bowl-O-Mat, Pueblo, paid Brunswick at the time when it paid in full, do you know what its total payments to Brunswick were?

A. I could look at it.

Q. Do you have it there?

The original sales price on the lanes was $208,942, and the original sale price in the pinsetters was $330,480, so if they paid in full they must have paid $538,000 plus interest.

Q. That's the NBO payment; is that right?

A. Yes.

Q. Sir, in Pueblo, some $400,000 was not paid by Belmont, and some $500,000 was paid by NBO; is that right?

A. Yes.

Q. And are you aware that Mr. Lieblich was from time to time protesting about Brunswick's continued operation or permission granted to Belmont to continue to operate?

A. Yes.

Q. During the period of time when it did

[4090]

continue, it did so to the extent of over $400,000 in debt to Brunswick; is that right?

A. I—

Q. It owed, we just established that.

A. Yes.

Q. And we also established that NBO paid in full, didn't we?

A. Yes.

Q. Do you know whether NBO was asked or was suggested politely to it that it should pay its debts to Brunswick?

A. Whether Pueblo—Belmont, or Pueblo?

Q. I'm talking now of NBO.

Do you know whether Brunswick suggested or requested NBO to pay what it owed in connection with the operation of the Bowl-O-Mat Pueblo center?

A. Yes, we asked National Bowl-O-Mat in Pueblo to pay—

Q. And it did pay, didn't it?

A. Yes.

Q. After three years time while it was competing with Belmont as a bowling center in Pueblo, all you got out of Belmont was one thousand—what was it, 68 dollars?

A. Yes.

[4091]

Q. That's equal-handed application of policy to credit, is that what you call it, in Brunswick?

A. Each case is—has different circumstances.

Q. In one case one man pays, and in another case he doesn't; is that what you mean?

You said each case was different.

A. That's true.

Q. Some pay, and some don't pay?

A. Yes.

Q. Some get credit, and some don't?

A. That's true.

Q. No necessary correlation between whether they pay and get credit, and they don't pay and get credit; is that right?

A. Yes, there is a correlation.

Q. Why was Belmont permitted to go three years paying only $1,000, if you know?

A. I don't know.

Q. What policy was applied to Belmont in extending that much credit to it for that long a period, if you know?

A. I am sure the same one, but I don't know.

Q. You don't know what it was?

A. I know the policy, but I don't know the circumstances.

[4092]

Q. Policy is equal-handed, isn't that what's written on the wall?

A. That's true.

• • •

[4102]

RE-DIRECT EXAMINATION.

By Mr. Seeley:

Q. Mr. Rice, I believe that you and Mr. Hoffmann agreed on roughly on the amount of $250,000 as the amount which Brunswick received payments on equipment at Fort Lauderdale; is that right?

A. I think so, yes.

Q. Can you tell me how much of that was received from Fort Lauderdale Bowl-O-Mat and how much was received from the previous owner of the equipment?

A. Yes, sir. Fort Lauderdale paid $15,000 on the lane contract—

The Court: On what?

The Witness: On the lane contract from April to November, and $18,000 so that would be—

[4103]

from October 1961 to April 1962, that's 33,000, and they paid—

The Court: 18,000 on the pinsetters or lanes?

The Witness: No, that was after refinancing they paid so much, and they paid 21,000 and 25,000, so they paid 46,000 on the pinsetter account, so 46 and 30, was that other figure—

The Court: 33.

The Witness: 77,000.

Q. Does that include both principal and interest?

A. Yes.

Q. Was the period of time during which you testified that Belmont Lanes didn't pay anything to Brunswick any

longer than the period of time during which Fort Lauderdale Bowl-O-Mat didn't pay anything to Brunswick?

A. Fort Lauderdale didn't pay anything to Brunswick from April 1962—they didn't pay anything from 1962 to 1962—they abandoned the center in 1964, in December of 1964.

Q. Was Mr. Cobian in San Juan, to your knowledge, refuted to be a man of considerable means?

A. Yes, sir.

Q. And to your knowledge, was the bowling center

[4104]

of Rio de Piedras Corporation, was that a business large, or small, or no means?

A. The bowling alleys?

Q. The corporation.

A. The corporation, we sold our contract, was to Rafael Ramos Cobian. His company, I don't know what the capitalization was in the company.

Q. As a credit man, to whom would you rather sell equipment on time payments, to a wealthy man or to a penniless corporation?

A. Obviously, to a wealthy man.

Q. What percentage of your contracts did you say are with corporations?

A. Over 60 percent.

Q. You don't know any corporations that drive sports cars or send grandchildren to college, do you?

A. No.

Mr. Seeley: Thanks for the chuckle. It was a weak joke. I appreciate it.

Mr. Hoffmann: I knew a few.

Q. Mr. Rice, suppose that Brunswick had a customer with whom it had business dealings over a period of quite a few years, some very large, like equipment contracts, others much smaller, like purchases of supplies on open accounts, and suppose that

[4105]

Brunswick came to the conclusion that on their open account dealings with this customer they had had so many arguments with him and had spent so much time trying to settle the amount that he owed, that it just wasn't worthwhile their carrying them on credit any longer.

In your opinion as a credit man, would it be in accordance with Brunswick's policy at that point to put such a man on c.o.d.?

Mr. Hoffmann: I object to the question.

The Court: Why?

Mr. Hoffmann: The evidence doesn't show that that's the situation here.

Mr. Seeley: There is a letter in evidence——

Mr. Hoffmann: Yes, there is.

The Court: Overruled.
Do you understand the question?

The Witness: Yes.

A. If the account wasn't profitable, we'd put him on c.o.d.

Q. Now, in Pueblo, Colorado, Mr. Rice, Pueblo Bowl-O-Mat paid for its equipment, did it not?

A. Yes.

Q. And does it now have a bowling center?

[4106]

A. Yes, as far as I know.

Q. Belmont Lanes did not pay for its equipment, did it?

A. No.

Q. Does it have any bowling center?

A. No.

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[4110]

Mr. Seeley: If the Court please, yesterday we marked and introduced into evidence without any objection as Exhibit D-56.

The Court: Financial report of Treadway for '72, I believe.

Mr. Seeley: Yes. Two places in the report in which reference is made to the prior trial of this case. And I think by this time the jury knows that there was a prior trial, but there was one parenthetical statement which I believe should be stricken.

The Court: Page, please?
I believe the pages are numbered.

Mr. Seeley: It appears on the last page of the President's letter, which is at the beginning, the page which bears Mr. Lieblich's signature.

The Court: Yes, outlook for the current year, left-hand margin, at the bottom of the letter.

Mr. Seeley: Yes. And at the top, "Antitrust law suit."

The Court: Yes.

[4111]

Mr. Seeley: Now, in that discussion, is this statement——

The Court: Where?

Mr. Seeley: The top paragraph on the page.

The Court: "We are still awaiting a date of trial"?

Mr. Seeley: Yes. Go on down to the bottom. It says, "In March and April when our case was tried for the first time the jury was unable to reach the unanimous verdict required in the Federal Courts (it was reported later that the vote was 11 to 1 in our favor)."

I believe I should be given permission to black that out, because it is obviously highly prejudicial and it is hearsay on its face.

Mr. Hoffman: Your Honor, I find this passing strange. This is Brunswick's exhibit. They introduced it, we did not. They introduced it without limitation. It became evidence in this case. Now, when they have taken the trouble to read their own exhibit, they find out it is embarrassing to them. I submit that it either be withdrawn in its entirety or left in its entirety.

The Court: Technically speaking, a verdict

[4112]

is never rendered that way, at least in this jurisdiction. I can't speak for any other jurisdiction. We have never permitted any numerical decision to be given by a jury—eight to four, or nine to three, or eleven to one; I am not too sure that isn't even hearsay on Mr. Lieblich's part.

And I think the record should note that one of the jurors walked into the Clerk's office and blurted this out before she—it was a woman, incidentally, who signed the voucher, and she said to the Clerk in the office, "We tried this matter"—the Clerk said, "We are not interested in that. Please don't discuss that." And she insisted and said, "I am going to tell you, anyway. It was 11 to 1."

I don't think it is fair to leave it there.

• • •

[4120]

The Court: Members of the jury, during your absence it was stipulated among the parties that the bankruptcy sale of American International Bowling Corporation took place on March 26, 1965, and was approved January 27, 1966. Stipulated by counsel to all parties.

So stipulated, Mr. Seeley?

Mr. Seeley: Yes, sir.

The Court: Mr. Hoffmann?

Mr. Hoffmann: Yes, sir.

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[4123]

JOHN L. HANIGAN, called as a witness on behalf of the defendant, having been sworn, testified as follows:

[4124]

DIRECT EXAMINATION.

By Mr. Seeley:

Q. Where do you live, Mr. Hanigan?

A. Glencoe, Illinois.

Q. What is your business or occupation?

A. I am chairman of the board of the Brunswick Corporation.

Q. Where were you born, sir?

A. New York City.

Q. Where did you spend your boyhood and school days?

A. In New York City.

Q. Did you have any higher education after high school?

A. Yes, I went to Stevens Institute of Technology in Hoboken, New Jersey.

Q. Did you graduate from there?

A. No, I did not.

Q. You left there and then did you go to work?

A. I did. I went to work for R. H. Macy and Company in New York in 1933. That was the only job I could get.

Q. Will you please, sir, trace your work experience from that time down to the time when you came to Brunswick Corporation?

A. I spent two years at Macy's, and then two years,

[4125]

'35 to '37, in the Army, helping run a CCC camp.

From '37 until '62 I was with the Corning Glass Works in Corning, New York, starting in 1937 as a pipefitter's helper, which I did for a year, continuing as doing boy's work in the bowling room of the Glass Works. Boy's work is not what it sounds like. Some of the boys are 60-odd years old.

I then became a foreman and eventually department manager, then a plant manager, then a manager of five plants, general manager of the largest division in the company.

[4126]

Q. And when did you join Brunswick Corporation?

A. Well, I went from Corning Glass to Dow Corning Corporation as executive vice president and general manager in September of 1962. I then joined Brunswick in December of 1963 as president.

Q. As president of the Brunswick Corporation, the duties of which post you assumed in December 1963, what was the scope of your responsibilities?

A. It was my responsibility to operate the company.

Q. What familiarity did you have with Brunswick's business prior to becoming its president?

A. Only what I could gather from its annual reports and reading about it in the press. And, of course, I investigated by talking with some of the directors and officers of the company before I joined the company.

Q. And when you began your duties as president of Brunswick Corporation, how did you go about determining the condition of the company, and what matters required your attention, and so forth?

A. Well, the first thing, of course, was to try to identify what the problems of the corporation were. I knew, even before I joined it, that it was not in good shape. And I wanted to find out exactly what its problems were and what the possible solutions

[4127]

were.

In order to do this I visited all of the plants that the corporation had and talked with the division managements and rather quickly identified the fact that the major problem that the company had was that it had to collect the bowling receivables which were owed to it.

Q. Did you have meetings with executives of the bowling division about that problem?

A. I had meetings with not only the executives of the bowling division, but also the credit department, the treasury people and others concerned, on the basis of approximately twice a week through the—January through perhaps June of 1964.

Q. And will you go into more detail, please, about what you said you identified as the major problem?

A. Well, the major problem was, in December of 1964, in looking at the financial figures of the corporation, it was quite apparent that we owed a lot of money. We owed some $300 million to 18 banks and two insurance companies. Excuse me. We owed that to three entities—18 banks, two insurance companies and the CIT Corporation.

The wherewithal to pay these debts was contained not in the operating profits of the company, but in the

[4128]

receivables that were owed to us by others, which at that time were in the neighborhood of somewhere between four and five hundred million dollars.

Q. What were the nature of those receivables?

A. They were principally installment notes for anywhere from one year to eight years for bowling equipment which had been sold by the corporation to bowling proprietors throughout the United States.

Q. What, if anything, did you find out about the condition of those receivables?

A. Well, I found out some things about the condition of the receivables, but, more than that, about the condition of the bowling industry as such.

At that time there were bowling proprietors who, either through lack of financing, or lack of management

skills, or for other reasons, or because they didn't want to, were not paying us what they owed us. This, in essence, was the principal problem facing the corporation, the lack of payment of these receivables by bowling proprietors.

Now, that is not to say that 90 per cent of them were not honestly paying their debts and doing it on time. But the other 10 per cent were a threat to the whole receivable portfolio, because, as some of them did not pay us, other people were put at an unfair

[4129]

disadvantage with those who were not paying.

So that in order to be fair to everybody we had to treat everyone alike and expect people to pay. To put it simply, if proprietor A did not pay us and proprietor B did, proprietor A would have an unfair competitive advantage over proprietor B.

Q. In your judgment at that time what, if any, effect did this situation have upon the financial position of Brunswick Corporation as a whole?

A. We were in trouble. If we did not collect these receivables, it was evident to me that the corporation faced bankruptcy. My principal job, of course, was to protect the interests of the stockholders and also the employees of the company.

Q. How many stockholders approximately did Brunswick have?

A. Somewhere around 120,000.

Q. Do you know about how many employees it had?

A. In the neighborhood of 15 to 20 thousand. I don't recall exactly at that time.

Q. In the course of these approximately twice weekly meetings which you had, were there any discussion of what might be done about the situation you have described?

[4130]

A. Yes, indeed.

Q. State, as best you can recall them, as fully as you can recall them now, what various alternatives were discussed at those meetings?

Mr. Hoffmann: Your Honor, I think greater specificity is called for. I think we should learn when the meetings took place, who were present when these alternatives were considered, and try to get them located in space and time.

The Court: Try to be specific, Mr. Hanigan.

Q. Where did these meetings take place, Mr. Hanigan?

A. They took place at what at that time was the headquarters of Brunswick Corporation, 623 South Wabash Avenue in Chicago, Illinois.

Q. And will you name as many as you can of the people whom you met on those occasions?

A. Well, that was nine and a half years ago—nine years ago, but I know that Mr. Jacobson was there, Mr. Rudo was there, Mr. Bremer, Mr. Abernathy, Mr. Cahill, who was the treasurer of the company at that time. I can't recall the others.

The Court: Fix the approximate date of the first meeting, if you can recall.

The Witness: Well, they took place at

[4131]

regular intervals through the first half of 1964.

The Court: The first half of 1964.

The Witness: Yes, sir.

The Court: Thank you.

[4132]

Q. If you please, getting back to my question, state your recollection of the possible courses of action which were considered and discussed at those meetings?

A. Well, there were some courses which were contemplated. One was to simply do what a lot of proprietors were suggesting, which was to let them operate bowling equipment which we had sold to them without collecting anything for it and permit them to pay us at some time in the future if they were able to do so.

Had we, as a business proposition, acceded to this request, it would have been unfair to the people who were paying us on a regular basis, because it would have given the people who were making the request an unfair competitive advantage.

But from our standpoint, it also probably would have resulted in other people then stopping paying us because they were at such a disadvantage.

And consequently, the whole receivable portfolio eventually would have gone down the drain, and we would not have been paid, and we would not have been able to pay our debts.

So we rejected that alternative.

Q. What other alternatives were considered?

A. We also considered the possibility of operating

[4133]

some of the houses that were going bankrupt for our own account.

The problem here was that we—and we had long arguments about this—that it had never been done before in exactly that form, and some of the people who still, at the end of 1963, thought that there was only a lull in the bowling business argued against it.

But it had been suggested to me really by bowling proprietors who were delinquent in their accounts. Their cry was, what good will this equipment do you if repossess it and take it out and put it in the warehouse?

This will only cost you money, and it will cost you money to store it.

And that argument was perfectly true.

My job was to make sure that I protected the interests of the stockholders of the corporation, and putting perfectly good equipment in a warehouse was not doing that in my view.

So the decision was eventually made that the real way to protect the shareholders of the corporation was to, A, try and get everyone that we could to pay us what they owed; B, if we could not do that through fair means of being even-handed with everyone in the business, that we then ought to repossess the bowling equipment that we had sold, and if we could operate it,

[4134]

operate it in order for it to produce cash which was our need.

We were not at that time as much interested in profits as we were in survival.

But it would produce cash for us with which to pay our bills.

The decision to go that way was taken sometime around the middle of 1964.

Q. Who made the decision?

A. I did.

Q. Now, was any consideration given to meeting this situation by selling the repossessed equipment?

A. Oh, yes. That had been the plan through 1963, and a rather elaborate sales campaign was put on in 1963 to sell the equipment.

This was another very dangerous method, because as these sales were—we were attempting to make these sales, some of these sales groups had reduced the price of the used equipment to a point where it would have paid a proprietor to not pay us and then buy back the equipment at a lower price than he had agreed to buy it in the first place.

This was another way in which we would have put in danger the money that was owed to the corporation and I could not do that and do my job.

[4135]

Q. Now, in addition to deciding that Brunswick under some circumstances would try to operate bowling centers with repossessed equipment, did you make plans and give directions to implement that?

A. Yes, I did.

In the middle of 1964 I directed that we set up a bowling center operating division, and eventually charged Mr. Rudo with its responsibility, relieving him of his responsibilities for selling the equipment, and separating it as a separate division of the company.

Q. Now, you said that efforts would be made——

A. That's Mr. Milton Rudo.

Q. Efforts would be made to collect your receivables on an even-handed basis.

To what part of the company was responsibility for trying to do that delegated?

A. To the Credit Department.

Q. BCOD have anything to do with collections or attempts to collect?

A. No.

Q. What department decided when collection efforts were futile and repossession was necessary?

A. The Credit Department.

Q. Did BCOD have anything to do with that?

[4136]

A. No.

Q. When did BCOD get into the picture?

A. Well, if the Credit Department, after having talked with the people who owed us some money, the proprietors who were delinquent, and after exhausting every means to get them to pay us and help them to pay us, decided that it was a hopeless situation, and they either could not or would not, the whole file was then turned over to the Legal Department for action.

The Legal Department then instituted repossession, legal business—I don't know exactly what you call it, but they instituted the motions to repossess the equipment, and at the same time the Sales Department which had nothing to do with BCOD, attempted to sell the equipment in place to someone other than the person from whom it had been repossessed.

This was done at a price which we had decided upon in the middle of 1964, and if at that time we could sell it to someone else, we certainly did.

At the same time, if the Sales Department could not sell, and did not appear to have any prospects, it was then evaluated by the BCOD people to see if they thought it could be salvaged.

If they thought it could, they would make a pro-

[4137]

posal to operate it, and in those days this had to be approved by Mr. Rudo, and he very often talked it over with me, but essentially the responsibility was his to decide whether he could salvage a bowling establishment or not.

If he decided he could, he opened it up and ran it.

Hopefully, the cash flow would be positive even though the profitability was not.

Q. Did you give Mr. Milton Rudo any instructions or guidelines as to what his financial objectives should be in operating these centers?

A. Yes, I did.

I rather put him in a box. I told him that he—it was his job to salvage as much cash from the repossessed bowling equipment as he could, but at the same time, it was also his job to put it on a profitable basis.

And these two things were sometimes mutually exclusive.

Q. What do you mean by the term, "salvage"?

A. Well, what I was trying to do was salvage the company. In order to do that, we had to salvage the value that was in bowling equipment.

To simply repossess it and put it in a warehouse

[4138]

was to make it—to sort of sterilize it as far as generating cash was concerned.

My objective was to generate cash from this bowling equipment and eventually profits so that we could get back on the basis where we could breathe with our creditors.

Q. Was any policy adopted at the same time BCOD was formed as to the possibility of selling any of the centers which it operated?

A. Yes. All of the centers which BCOD operated from the very beginning were for sale, and still are.

We haven't been too successful in selling them, however.

Q. Do you have any opinion as to why you have not been successful?

A. Yes. I think that the bowling business as a business, unfairly, in my opinion, doesn't have a very good reputation as a money making business. People have long memories, and they remember the fact that a lot of people did lose money in the business in the late 50's and early 60's, particularly early 60's.

Q. Keep your voice up so that the jury doesn't have to strain to hear you.

A. Excuse me.

It is for this reason that even today people hesitate

[4139]

to invest in retail bowling business.

We have found it to be a very good business.

Q. To what extent has the bowling centers operating activities succeeded in accomplishing its mission or purpose as you have described it?

A. It succeeded very well. At the same time it is producing a substantial pre-tax profit, and generating cash, and it has generated cash since, oh, about 1967, as I recall it, and it is, it has gone into the black in 1969, and it has been in the black ever since.

It grows substantially each year, more or less with the population in the areas where we operate, and while I think some of our competitors feel that we are too easy in being competitors, we like the business.

Q. Mr. Hanigan, was it any part of the purpose or objective of Brunswick Corporation in deciding to operate some bowling centers to exclude competing bowling centers from the business?

A. Absolutely not.

Q. Was it any part of the objective or purpose to gain a position in the industry where you could set prices for bowling?

A. Absolutely not.

This would be silly. We only had at the most

[4140]

two or three percent of the total.

Mr. Hoffmann: I move that the last part of the answer be stricken as not responsive.

The Court: Why not, Mr. Seeley?

Mr. Seeley: Your Honor, I didn't even hear it.

The Court: He said they only enjoyed three percent of the business, or words to that effect.

I will order it stricken, and the jury is instructed to ignore it.

You can pursue it if you care to.

Q. Approximately what percentage of the bowling centers in the country does Brunswick operate?

A. We have about 170 out of approximately 9,000, which is a small percent.

Q. Was it ever the purpose or policy of Brunswick Corporation to discriminate in its credit treatment among its customers for the purpose of favoring some and injuring others of its customers?

A. No. Our purpose in working with our customers was to collect the money that was owed to us.

We had to do that in order to survive ourselves.

The instructions which I gave the Credit Department were—was that they should be fair with everybody and

[4141]

try and help the customers in any way that they could so that we would get paid.

This was the principal thrust of the Credit Department's work.

Q. Was it ever a purpose or policy or a decision or an intention of Brunswick Corporation to cause Bowl-O-Mat centers to default in their obligations so that Brunswick could take over those centers?

A. Absolutely not.

Q. Now, Mr. Hanigan, has Brunswick built and opened some new bowling centers?

A. Yes, sir.

Q. What is its purpose in doing it?

A. Well, so far as the bowling part of our business is concerned, our purpose is to make and sell bowling equipment.

We are constantly trying to do that with other people.

In pursuing this aim, we have some people who go around the country looking for places that look good to us for opening a new bowling center.

[4142]

Q. You mean Brunswick people working for Brunswick?

A. Brunswick people working for Brunswick go around the country and try and figure out which will be a good place to put a bowling center, where the economic conditions are right and the growth conditions in the area and that sort of thing.

When we find such a place we try and interest bowling proprietors or investors or other people in putting in a bowling center and buying the equipment from us.

If we cannot find anybody, we then draw up plans to go ahead and acquire property to put in a bowling center ourselves.

At this point we are perfectly willing to sell it to anybody for a price that will get us out whole plus 15 per cent for our overhead and time and that sort of thing.

At this point it is simply another device to interest people in getting into the bowling business.

Failing to find anyone to buy our equipment and put up a bowling establishment, we do it ourselves. At this point it is not for sale for one year, until we establish the cash flow and the profit potential of the area.

[4143]

At this time it is then offered for sale as a going business, and naturally, at a higher price than the equipment price.

We think this is good business for us in that it is a new way of selling bowling equipment. It also gives the investor some assurance that what he hopes will happen there is in fact happening so that he can invest his money with more assurance that he has a viable business than he could if he just bought the thing and started the business himself.

Q. What are Brunswick's present plans or expectations as to how many of these new centers it will build in the United States?

A. Oh, we will build three, four, five a year, something like that.

We hope we don't build any——

Q. Sir?

A. We hope we will not build any, if we can sell the equipment in all of the good places, we won't build any——

Mr. Hoffmann: I ask that the latter part be stricken. It is also not responsive.

The Court: So ordered.

You expect to build three or four a year. All right.

[4144]

Q. Would that expectation be changed if you found that you were able to sell the sites and equipment to someone else?

A. Yes, sir.

Q. Now, does Brunswick also through BCOD manage any bowling centers?

A. Yes, we do.

Q. What is the purpose of that?

A. People come to us who have grown older, a lot of these people started bowling establishments even before the bowling boom in the '50's, and they have reached the age where they'd like to take it easy.

They come to us and say, "We'd like you to manage the center for us."

In that case we try and work out an arrangement where we can do it and they can be assured of some income from it.

Q. In its operation of bowling centers through BCO does Brunswick have any intent or purpose to injure competitors in any way?

A. No.

Q. Now, you say that some of the BCO centers did show losses at certain times; is that right?

A. Yes.

Q. Now, were those losses incurred for the

[4145]

purpose of weakening and excluding competition in the markets where those centers were operated?

A. Absolutely not.

Q. What is the policy of the company with respect to continuing the operation of a center which fails to produce a cash flow?

A. Well, as I said before, my instructions to Mr. Rudo was that he should salvage as much of the repossessed equipment through operation or sale as he could, to make money. He in his judgment decided when he thought a bowling center could be made into a viable entity and when it could not.

And if he decided that it could not, he closed it down.

If he thought that it could, he permitted it to be operated until either he proved to be right or proved to his own satisfaction that he was wrong and shut it down.

Mr. Seeley: You may cross-examine.

CROSS-EXAMINATION.

By Mr. Hoffmann:

Q. Mr. Hanigan, do I understand correctly from your direct testimony that when you refer to "salvaging a bowling center" you are not referring to salvaging the center as such, but you are referring to salvaging the

[4146]

business of Brunswick; is that your testimony?

A. I am referring to salvaging the business of Brunswick, of course, but I am also referring to salvaging the value of the equipment which is owed to us.

Q. Well, Mr. Seeley asked you a specific question. It was, what do you mean by salvaging?

And you answered it specifically, did you not?

And your answer was, you meant by salvage, the company, the Brunswick company.

Wasn't that so, you were salvaging the Brunswick company?

A. Yes.

Q. Now, in salvaging the Brunswick Company, you were confronted in 1964 with a large number of outstanding machines; is that right?

A. Yes.

Q. And there were several courses of conduct open to you. One was to repossess the equipment and put them into warehouses, that is to say, the lanes and pinsetters; is that right?

A. Yes.

Q. That was done, wasn't it, in many instances?

A. Yes.

Q. Do you have any idea in how many instances?

A. Oh, we think eventually ended up with some

[4147]

6,000 pinsetters.

Q. In warehouses?

A. Yes.

Q. Those were pinsetters which had been sold on conditional bills of sale to bowling proprietors; is that right?

A. They were pinsetters that had been sold to proprietors. I don't know what a conditional bill of sale is.

Q. You have got a right to get them back if the proprietor didn't pay; isn't that right?

A. Yes.

Q. And you took them back, 6,000 of them. Was that a way of salvaging the Brunswick company?

A. No, sir.

Q. Well, tell me, sir, what happened to the 6,000? If you know.

A. Eventually in the years between the time that they were repossessed and now, we have rehabilitated them, in many cases upgraded them to a new and faster machine, and resold them as used equipment.

Q. You haven't been stuck with very many that were scrapped, have you?

A. Yes, quite a few.

I don't recall how many, but quite a few we had

[4148]

to scrap.

Q. Now, when you sold a pinsetter to a bowling proprietor, if you got back the manufacturing cost and then sold the pinsetter again when it was rehabilitated, you made a profit, didn't you?

Isn't that what we mean by a "profit"?

A. No, we did not make a profit at that point. Very often we had a loss, still, but the point is that an asset of the company when I went there was the receivable, and that had disappeared when we repossessed the equipment.

Q. You say you had a loss in—when you say you had a loss in many instances, I ask you to pause over that.

You sold the machine, let's say the pinsetter, once, first time around.

You got a down payment, didn't you?

A. Sometimes.

Q. It was your choice, you didn't sell it without a down payment unless you wanted to?

A. In some instances that is true, we did not get a down payment.

Q. Were there very numerous instances?

A. Not numerous, but some.

Q. A few?

[4149]

A. Yes.

Q. Out of many thousands of pinsetters; is that right?

A. The down payments were minimal in other cases.

Q. You got a down payment, did you not?

A. Yes.

Q. Except in a few instances?

A. Yes.

Q. And then, sir, in many situations you got further payments on the installment contracts, didn't you, from the persons who bought?

A. In most cases we did.

Q. Yes.

So now you have some money back. Could be that money is less than manufacturer's cost, could be that money exceeds manufacturer's cost; isn't that right?

A. I don't see where that's—that has any bearing.

Mr. Hoffmann: Your Honor, the witness' remark I ask to be stricken.

The Court: So ordered, and the jury will be so instructed to ignore it.

Q. Now, sir, are you going to answer my question: You do, don't you, sometimes get back more than the manufacturer's cost before you repossess the machine?

[4150]

A. Sure.

Q. Do you have any idea just in the aggregate in how many instances you got back manufacturer's cost before you repossessed?

A. What's your definition of "manufacturing cost"?

Q. What the cost was to make and sell the product.

A. I would—I don't know in how many instances we got back our manufacturing cost.

Q. Maybe I can help you with this. We have had testimony in this proceeding that the manufacturing cost

per pinsetter in that period of time was about $2200, there were some variations in the testimony over a span of a couple of hundred dollars——

The Court: Just a minute. Don't answer.

Mr. Seeley: The testimony, as I remember it, as to manufacturing cost did not include selling cost, as Mr. Hoffmann has included in his question.

The Court: Mr. Hoffmann?

Mr. Hoffmann: Your Honor, that's my recollection of the testimony, that it included——

The Court: Give him a hypothetical.

Q. Suppose it cost $2200 to make and sell the product.

[4151]

Do you have any idea of whether or not the 8,000 machines which you say you repossessed produced a revenue which would be reflected by multiplying 8,000 by $2200?

A. I do not.

Q. You don't know one way or the other.

And do you know the answer to that question if we consider not only the first sale and repossession, but a second sale of the same equipment, even though the equipment may have been in some way rehabilitated?

A. What's the question?

Q. Do you understand my question?

A. No, I don't.

(Record read.)

A. No, I don't.

Q. You don't know?

A. No.

Q. Now, sir, I put it to you that the bowling operation business is a good business.

A. Correct.

Q. Do you agree?

A. Yes.

Q. You have how many thousands of employees devoted to the bowling operation business in the United States?

[4152]

A. I don't know exactly, but I would guess five thousand.

Q. That's to the operation, we're not talking now about the manufacture, sale of products?

A. That's right.

Q. You have about five thousand devoted to operating bowling centers primarily; is that right?

A. That's a pure guess.

The Court: He said it is a guess, Mr. Hoffmann.

Q. You have about 170 centers that you operate?

A. Yes.

Q. Do you know how many centers you have sold over the years, operating centers?

A. I don't know, I would guess again, six, seven, eight, something like that.

Q. Do you know how many you sold between the years 1965 and 1970?

A. No, sir.

Q. Well, you did know in 1970, didn't you?

A. This is 1973.

Q. You have forgotten.

May I refresh you by suggesting that there were two that were sold in that five-year period.

A. If that's what I said, that's what it was.

[4153]

Q. You said it also, didn't you, in 1972, in a newsletter; do you recall that?

A. No, I don't.

Q. May I read a brief sentence:

"The company has resold six retail bowling centers since 1965, of which four were sold in 1971."

I took away from six and concluded that only two were sold between 1965 and the beginning of 1971; is that right?

The Court: You have to answer.

A. Yes.

Q. And then in 1971 you sold four; isn't that right?

A. According to that letter it is. I don't recall.

Q. You have no reason to suppose that this letter is inaccurate, do you?

A. No, I do not.

Q. Indeed, if I may show it to you, it is attached to a letter of yours to the stockholders, is it not?

A. Yes.

Q. Do you know how many, if any—

A. I can't hear you.

Q. Do you know how many, if any, Brunswick operated centers have been sold since 1971?

[4154]

A. I do not.

Q. Do you know whether any has been sold?

A. I believe they have, yes.

Q. Do you believe as many as one or two?

A. Yes.

Q. More than that?

A. I don't think so.

Q. Now, sir, in answer to a question put to you by Mr. Seeley you suggested that the reason why more had not been sold was because the bowling industry had long memories; is that right?

A. Investors have long memories.

Q. That is investors in the bowling industry?

A. Investors in general have long memories.

Q. And the long memory includes a bowling operating depression, does it not?

A. It includes the memory of many people not making money in the bowling industry.

Q. And do you recall about when the bad years began in bowling, that is to say, in the recent decade?

A. Well, they had begun when I came to the company, and my information is that they had begun in the previous year, 1962.

[4155]

Q. About 1962, is that what you are saying?

A. Yes.

Q. Did there come a time when this bleak period—if I may call it that—came to an end?

A. So far as the retail operations are concerned, I don't think there ever was any bleak period, except for people who were under-financed or under-managed. Most people in the business were making money.

Q. Right along, from '62 to 1972?

A. That's my information; yes, sir.

Q. How about Brunswick, when it was operating bowling centers during that period, during most of that period was Brunswick making money?

A. Having taken over bankrupt places, of course not.

Q. Well, sir——

A. However, these bowling centers did start to do some cash in 1967, which was our principal concern at the time.

Q. Do you know whether or not they started to produce profits for the company beyond a positive cash flow?

A. In 1969 they did.

Q. And before that you had been operating on a non-profit or loss basis starting in December of 1964, is that right?

[4156]

A. That's correct.

Q. That was when you first acquired a bowling center, '64.

A. That is correct.

Q. '64, '65, '66, '67, '68 and then in '69 it turned; is that your testimony?

A. Yes, sir.

Q. Do you think the business was good for other proprietors in the industry, as a general rule, on the average during that period, 1962 to 1969?

A. 90 percent of those who owed us money paid us on time. And judging by that, I would say it was good.

Q. How did you run all these accounts receivable which threatened to put the Brunswick Corporation into bankruptcy, according to your direct testimony, how did that come to pass?

A. If we had taken some of the other paths which we might have, foolishly, it would have, in essence uncovered the receivables which we did collect, by being unfair to the people who were paying us.

Q. You spoke of there being an urgent problem when you came to Brunswick, isn't that so?

A. Yes, sir.

Q. And did I understand you correctly to say

[4157]

that that urgent problem was the amount of the outstanding receivables?

A. Yes, sir.

Q. And weren't these receivables mostly——

A. Excuse me.

Q. Please answer my question. Weren't these receivables——

A. Well, I would like to change my answer. It was not the outstanding receivables, it was the collection of them that was the problem.

Q. You mean that money was owing, unpaid, to Brunswick, but it was the collection of them that was the problem, is that right?

A. Yes, sir.

Q. That answer suggests that there came a point in time when you collected them, is that right?

A. Some we did, some we did not.

Q. Well, sir, if Brunswick was in the edge of bankruptcy, if that is the meaning of your testimony, was it because of outstanding receivables owing to Brunswick through the operation of bowling centers?

A. It was due to the fact that some of the people either would not or could not pay us, and they, by—if we had let them not pay us, this would have threatened the rest of the receivables and would have

[4158]

threatened the viability of the company.

Q. And so, to solve this problem, you said, "Let's go out and collect," is that right, collect on a fair, non-discriminatory basis?

A. That is correct.

Q. And then you handed it over to the Credit Department for that purpose; wasn't that your testimony?

A. That is correct.

Q. Do you have any idea as to whether or not the Credit Department applied your policy of collecting on——

A. I believe they did.

Q. I hadn't finished my question. —of collecting on a non-discriminatory basis?

A. I believe they did; yes, sir.

Q. You believe it. Do you know it?

A. They reported to me what they were doing and I considered what they were doing to be in direct obedience to my instructions.

Q. Did they report to you, sir, what they were doing in Pueblo, Colorado, about collecting receivables?

A. Of course not.

Q. Well, you say, of course not; what do you mean by, "of course not," why not?

[4159]

A. They did not report in detail on every case. We had too many of them.

Q. Well, if they didn't report in detail on every case, how did you know that your policy was carried out in every case?

A. I don't, of my own knowledge.

Q. You don't know that?

A. However, I have great confidence in Mr. Abernathy, and he told me that they were doing it according to instructions.

Q. And if I suggested to you that Mr. Abernathy's testimony, in effect, was that he didn't know whether it was being carried out in every case, who would I look to, to find out?

A. The individuals in the Credit Department who did the actual work.

Q. Do you know anything at all about handling of credit in Pueblo, Colorado?

A. No, sir.

Q. Have you been told that one center was carried by Brunswick for a period of about three years, having paid only $1,068, was that told to you, sir?

A. No, sir.

Q. Whereas other centers had paid many thousands of dollars to Brunswick, was that told to

[4160]

you, sir?

A. Yes, sir.

Q. That was? Who told it to you?

A. Mr. Abernathy and Mr. Cahill.

Q. Didn't there come a time when Mr. Lieblich complained to you about that?

A. I don't recall.

Q. You don't recall meeting with Mr. Lieblich concerning the subject in Chicago?

A. No, sir.

Q. Were you informed about the situation in San Juan, Puerto Rico?

A. No, sir.

Q. Do you have any knowledge at all of how much money was owed by a bowling center called Star Bowl?

A. No, sir; I do not.

Q. You don't know anything about this. How about in the area of Fort Lauderdale, Florida, in that area, do you know anything about Brunswick's extension of credit there?

A. No, sir.

Q. But if your policies were carried out in these places, credit would have been extended fairly and in a non-discriminatory fashion to all Brunswick consumers, is that right?

[4161]

A. That is correct.

Q. Now, sir, do you have any way of knowing whether or not your policy of fairness was carried out by the people in the Credit Department?

A. Of my own knowledge?

Q. Yes, do you know?

A. No, I don't.

Q. Did you ask them every so often: Are you carrying out my policy?

A. Oh, yes.

Q. And what would they say, "Yes, sir"?

A. Yes.

Q. And then would you ask them for details about carrying it out?

A. No, sir.

Q. You just took their word for it?

A. Yes, sir.

Q. Why was it necessary to ask the question, if you are going to just take their word for it?

A. I wanted to be sure that we were going to collect this money. It was vital. The way to do that was do it on a fair basis with everybody.

Q. Do you ever remember sitting down with people in your Credit Department—Mr. Abernathy, perhaps—and saying to him: Make sure, Mr. Abernathy,

[4162]

that you don't discriminate between NBO and any purchasers of Brunswick pinsetters and lanes who are in competition with NBO?

A. I do not recall ever saying that.

Q. You never said that, did you, to them?

A. Not that I can recall.

Q. But your policy was that it should be done——

A. Yes, sir.

Q. I'm sorry. Please wait until I finish my question. —that it should be done in a non-discriminatory fashion?

A. Yes, sir.

Q. Do you know that old legal maxim, "The thoughts of men are not to be tried, only the devil knows the thoughts of man," have you ever heard that maxim?

A. No, sir.

Q. It was Rudo who decided to run the various bowling establishments, is that correct?

A. No, sir.

Q. That was a note I made. I didn't make an accurate note of your testimony?

A. It was I decided they were to be run. He decided how long they were to be run.

Q. You made the decision as to which ones would be run?

[4163]

A. No, no.

Q. The general decision that bowling centers would be operated by Brunswick?

A. Yes, sir.

Q. That was your decision?

A. Yes, sir.

Q. But the question as to whether or not particular bowling centers would be run by Brunswick, that was a decision for Mr. Milton Rudo, is that your testimony?

A. After attempts to sell the equipment had failed, it was his job to decide whether we would operate them or not.

• • •

[4164]

Q. Mr. Hanigan, once Brunswick acquired and operated a bowling center, was it Mr. Rudo's decision to decide whether it would subsequently be closed down?

A. Yes.

Q. Now, how about the matter of the sale of such center, a Brunswick owned and operated center, was Mr. Rudo to make the decision as to whether or not the center should be sold?

A. There is a break in continuity. At one time Mr. Rudo was in charge of just operating the centers. He is now in charge of bowling——

Q. Do you know about when that change took place?

A. I can't remember, but let me put it this way: When he was responsible for operating the bowling centers he and the bowling division with my concurrence set up a formula for pricing the centers and the bowling division apart from the BCO is responsible for selling them.

Q. Do you know what that formula is?

A. I don't.

Q. Is this a formula which is useful in the sense that somebody in BCO could say, what is the sale of a center formula. I can go out and sell a center, could

[4165]

it be used in that way?

A. It wasn't the BCO's job to sell it. It was bowling division's job to sell it.

Q. However, in doing the selling was there such a formula around so that if you have 50 salesmen they could all be armed with the formula and go out and try and sell a center?

A. Oh, I think not.

I think that if a salesman had a prospect for a center he would come or talk on the telephone and find out what the selling price was, the comptroller of the division would in all probability put together the numbers for Mr. Rudo and establish the price. That's when he was in charge of both groups.

Q. Whoever is in charge now, if I want to buy a center, how do I find out whether it is for sale?

A. If you were—if a salesman were to approach you, believing that you are a prospect, he would already have the price.

Q. Suppose he didn't approach me. There I am, hungry to own a Brunswick operated center, and I pick up the phone and I say, "Is this the Brunswick Corporation? I want to buy your center, Lodi."

What happens from then?

A. You get an answer back very quickly as to how

[4166]

much it was.

Q. Would some fixed formula that I would know about in advance or find out in advance be applied if you quote me a price?

A. No, you'd be quoted a price.

Q. But would I be quoted a price which was calculated by a Brunswick official in terms of applying some fixed formula?

A. Yes.

Q. You say such a formula exists?

A. Yes.

Q. But you don't know what it is; is that your testimony?

A. That's right.

Q. Do you know anybody in the Brunswick organization who knows what that formula is?

A. I think perhaps I know—I know that Mr. Curren would, the present comptroller of the division.

Q. Do you think that Mr. Rudo ought to know that formula?

A. Not necessarily. I think perhaps Mr. Bensinger, the marketing manager, would know it.

Q. Rudo was not in charge of this for quite a while?

A. Yes, he helped formulate the formula, but I doubt

[4167]

that he would remember what it is.

Q. If he used it often he would remember it, don't you think?

A. Not necessarily.

Q. If it is a formula applied, two times two, that's a formula.

You think Mr. Curren would know?

A. Yes.

Q. Can you name anybody else who would know?

A. I don't know.

Q. Surely you don't want for the Court and jury to believe that there is only one person in this vast organization that would know this formula which is applied to the sale of Brunswick operated centers?

A. I expect there are more. I don't know who they are.

Q. So if I asked you today to sell me a center, assuming you found me otherwise acceptable, where would you—how would you go about finding out how to quote me a center?

A. I'd get on the telephone and talk to Mr. Rudo, and he'd give me the answer.

Q. He'd have to talk to someone else?

A. Yes.

Q. He'd know who to talk to?

[4168]

A. Yes.

Q. Do you know whether there have been over the years lots and lots of Brunswick salesmen going through these United States up the alleyways into the small towns looking for the bankers, trying to sell these centers?

A. I don't know whether they follow that description, but the salesmen have been approaching other bowling proprietors and investors and some bankers.

Q. Would you say——

A. Trying to sell.

Q. Would you say vigorous efforts have been made to try to sell these centers over the years?

A. Yes.

Q. And your success was meager; is that it?

A. That's right.

Q. And this is true even though bowling is no longer in the depression, isn't that so, depression seems to be over, is it not?

A. I never said there was a depression.

Q. Bleak days?

A. That was your description.

Q. You didn't share it?

A. No.

Q. There have been no bad days at all starting

[4169]

in 1962?

A. There were for some people, not others.

How about for Brunswick?

A. Sir?

Q. Was there bad days for Brunswick in bowling?

A. Oh, yes.

Q. Were you at the edge of bankruptcy, is that what I was to understand from your direct testimony?

A. Yes.

Q. What year was that?

A. Well, I expect it was 1963 and forward. The earnings of the company started to recover in 1966, and in subsequent years did recover.

Much of this recovery was for divisions—due to divisions other than bowling.

Q. You came into Brunswick again, when?

A. In December 1963.

Q. And you were in Brunswick in 1964, 1965, 1966, and so forth?

A. Yes.

Q. As president of the company; is that right?

A. Yes.

Q. And in 1965 you went to San Juan, Puerto Rico, and explained to the bowling proprietors why it was that Brunswick was taking over centers; isn't that

[4170]

so?

A. Yes.

Q. And you called it a salvage operation, did you not?

A. Yes.

Q. Did you indicate it was a salvage of Brunswick and not of the proprietors when you made your remarks to San Juan?

A. It was a salvage of the equipment as well as of Brunswick.

Q. That is to say, of money that could be made from the equipment?

A. Yes.

Q. And now, Mr. Hanigan, were you at the edge of bankruptcy, was Brunswick at the edge of bankruptcy in 1965 when you went to San Juan, Puerto Rico?

A. We were very close to it.

As a matter of fact, in the fall of 1965 we had to set up reserves because it became apparent at that time that our balance sheet was overstated and it was necessary to set up these reserves to make it an accurate reflection of the real worth of the company.

When that happened we breached our covenants with the lenders and had to approach them to recon-

[4171]

stitute a loan for $190 million, which we were able to do on less favorable terms than we had had before that time, and if they had not gone along with us in the expectation that we would be able to collect our receivables in large part the company would have been bankrupt at that point.

Q. In 1965 you had money owing, did you, to CIT?

A. Yes.

Q. A sizeable amount, do you remember?

A. It was sizeable, yes.

Q. And then you got a new loan, 18 banks and insurance companies; is that right?

A. Yes.

Q. And then you paid off CIT?

A. Yes.

Q. No longer owed money to CIT?

A. That's correct. I don't remember what year we finished paying them off, I think it was 1968.

Q. What sort of loan are we talking about, how much?

How much was this loan from the 18 banks—

A. $190 million.

Q. In your experience do banks and insurance companies lend 119 million—

[4172]

A. 190 million.

Q. $190 million to bankrupts?

A. They had already loaned it.

Q. But you got a new one?

A. We got a new one because we gave them assurances that we were going to collect the money as we expected.

Q. You also paid off CIT. Do you remember how much?

A. I do not.

Q. But it was a very sizeable amount in the many millions of dollars, wasn't it?

A. Yes.

Q. You didn't default on your obligations to CIT?

A. No, sir.

Q. Did you default on your obligations to the banks?

A. We did in the sense that we had breached the covenants which described the loan.

Q. That's descriptive language, you didn't default in the sense of not paying them that money?

A. No, sir.

Q. Now, sir, in 1965, I read to you from the annual report in 1965. Brunswick—

The Court: Excuse me. Is it in evidence?

[4173]

Mr. Hoffmann: It is in evidence, your Honor, as defendant's Exhibit 30.

The Court: All right. I just wanted to set the exhibit on the record.

Mr. Hoffmann: Page 6.

Mr. Seeley: I didn't hear the number.

Mr. Hoffmann: Defendant's Exhibit 30.

Mr. Seeley: Thank you. What page?

Mr. Hoffmann: Page 6.

By Mr. Hoffmann:

Q. "Brunswick enjoys a substantial cash flow from collections on bowling installment notes receivable. In 1965 these collections more than covered the following uses and totalled $87,119,000."

And then the exhibit lists the uses that were covered by the collection: Payments on debt in 1965, CIT borrowings, $20,935,000, bank borrowings, $10,000,000, mortgages and others, $5,000,000-something, total payments $36,000,-000-something.

Interest paid on borrowings, $18,520,000, for a total of $54,624,000.

Now, when we take away all these payments, these payments on the borrowings, CIT, to the banks and the mortgages, from those bowling receivables, that is to say, when we take $54,000,000 and something from

[4174]

87 million and something, we have left a line of $32,495,-000 which shows collections available for other purposes.

Do you see that, Mr. Hanigan?

A. Yes, sir.

Q. Does that mean that the bowling receivables not only more than covered the bowling obligations, such as

the borrowing from CIT and the banks, but also left over $32 million for other company uses?

A. That's right.

Q. And indeed, the report says that the remaining $32 million—I have turned the page to page 7—495,000 dollars when combined with funds generated from other sources was sufficient to finance the company's additions to fixed assets, to pay state, local and federal income taxes, to meet general operating needs, and also to produce a net increase of $9,879,000 in cash and marketable securities at the end of 1965 compared to December 1964, and so forth.

In March 1966 Brunswick of Canada, Ltd., paid $6 million long-term loans, leaving a balance of $11 million, and so forth.

Is this a picture of a failing business, a bankrupt business?

A. It would have been if we hadn't changed our stance in 1964.

[4175]

Q. And the change of stance was what; what did you change from and to?

A. We changed from prices which were not firm, from credit which was not firm, and we started to operate bowling centers, all of which were in the direction of collecting the receivables that were owed to us.

If we had not collected that $87,000,000, the banks would not, would have not have extended their loans and we would have been bankrupt.

Q. You did not become bankrupt?

A. We did not.

Q. Th banks did extend your loans and your receivables from bowling operations exceeded your expenses; isn't that correct?

A. That's right.

Q. Something like a lawyer saying, I have got an awful lot of law business, but if I don't collect my fees, I might go broke; is that more or less the position of Brunswick?

A. No.

Q. The receivables, if they weren't collected, that's what you were worried about?

A. If we had not taken action in 1964 in my opinion, we would have been bankrupt in 1965.

Q. And the action you took again was to go

[4176]

into the bowling business; that was one thing; wasn't it?

A. That was one thing.

Q. And the other thing was to firm up prices; is that right?

A. Yes.

Q. And to collect, decision was made to get everyone to pay and to use even-handed means in credit; is that right?

A. That's right.

Q. Now, you don't know, except that you have made such a policy, you don't know whether or not in particular situations about situations that that policy of even-handed credit was applied in practice; isn't that also so?

A. I have every confidence it was.

Q. You have the confidence, but you don't have the knowledge; isn't that correct?

A. That's right.

Q. Now, didn't there come a time, Mr. Hanigan, when you decided that bowling, if you will forgive me, was one hell of a good business?

A. Yes, I did, it is.

Q. And that is true for the good bowling proprietor, isn't it?

A. Yes, sir.

[4177]

Q. I read some remarks attributed to you on July 1, 1970, in a publication called, "The Investors Reader." It is, I think, widely circulated by Merrill, Lynch.

"Quiet spoken Jack Hanigan who wears metal framed glasses——"

A. I have changed.

Q. I was very troubled about the accuracy of the report.

"Says it is a comfort these days to have a solid balance sheet. 'We have cleaned it up. Our accounts receivable are in strong hands. For the good bowling proprietor, bowling is a hell of a good business.' "

Are you properly quoted there in this report?

A. I had an interview with a young lady and told her that.

Q. She seems to have reported you correctly?

A. Yes.

Q. This article also says, "To Jack Hanigan, a Brunswick business—" and now I quote, or rather I read her quote—"must have a technical advantage or be a major factor in the market or both."

Did you also say that?

A. Yes, sir.

[4178]

Q. You are properly quoted?

A. Yes.

Q. Tell me, if you can, whether or not the Brunswick operation of bowling centers today are such that Brunswick has in them a technical advantage?

A. No, sir, we do not.

Q. You do not.

Well, you have 5,000 people more or less devoting their energies to the operation of bowling centers within this country?

A. Yes.

Q. Did you make any provisions for paying out some unemployment benefits to them or putting them to work elsewhere in the organization in the event that tomorrow you sell off all of your 170 bowling centers?

A. We have benefits for all our employees.

Q. Wouldn't this be a disaster if tomorrow your 5,000 employees had to be taken care of because you went out of the bowling operating business?

A. Certainly would.

Q. You don't anticipate that that's going to happen; do you?

A. I do not.

Q. Indeed, you believe that Brunswick is in the bowling operating business to stay, don't you?

[4179]

A. If history continues, that's true.

Q. And reason to suppose that the history which you say, if it continues, is there any reason to suppose that history will not continue?

A. No. I think it will continue for a time.

It is possible that in the future investors will become more interested in the bowling business, as I think they should.

Q. Do you, before you build a new center, Mr. Hanigan, make sure you have a purchaser for it?

A. No, sir.

Q. You build it and throw—make it a hostage to fortune; is that what you do, just build it and hope that

some day sometime somebody might come along and buy it from you?

A. We are trying to develop the bowling business throughout the country to the point where it should be in our opinion and in that—to that end we try to seek out places where people do not have enough bowling lanes to bowl in, and we then try to sell somebody on putting bowling lanes in. If we cannot do that, we do it, and we do hope that at some future time we will sell it, but if we do not, we now know through our operation of bowling centers that this is a good business, and it is not such a hostage to fortune because

[4180]

we can make money with it and hopefully prove to others that they can make money if they did invest in it.

Q. Do you know today how much of the revenue of the Brunswick Corporation is derived from the operation of bowling centers?

A. I do.

Q. How much, would you say?

A. Must I answer that? We don't publish the information.

The Court: Percentage-wise.

The Witness: Percentage-wise it is about 1/12th.

Q. Can you tell us what the total gross revenue of the Brunswick Corporation is?

A. In 1972 it was $634,000,000.

Q. Are we then to conclude that 1/12th of 672,000,000 dollars represents your revenue from bowling?

A. That's the revenue from the bowling center operations.

Q. Yes?

A. Yes.

The Court: Center operations alone, not the manufacture——

The Witness: No.

[4181]

Q. I don't think it could be much of a secret, Mr. Hanigan, in this courtroom any longer, since it's now a matter of our doing fractions and dividing——

A. I understand that.

Q. Indeed, sir, don't your annual reports usually break up the sources of revenue?

A. No, sir, they do not.

Q. Don't your statements to your stockholders speak to your bowling revenue?

A. No.

Q. Never have been so?

A. No.

Q. Do you remember an article about Brunswick in Forbes Magazine?

A. Yes.

Q. The article caused you to write a letter which I showed you a little earlier this morning; isn't that so?

A. Yes.

Q. I read to you:

"In addition the article implies that——"

Mr. Seeley: Is there something we can identify?

Mr. Hoffmann: Maybe I should have it marked.

[4182]

Mr. Seeley: I'd like to see it before any of it is read.

Mr. Hoffmann: I read it before.

Mr. Seeley: I still want to see it.

(Exhibit P-80 marked for identification.)

Mr. Hoffmann: I will give a description to the Reporter.

Two-page document entitled—letter entitled, "Dear Stockholders," on Brunswick stationery, first page signed by John Hanigan, second page attached called, "News from Brunswick Corporation."

The Court: Dated?

Mr. Hoffmann: Sorry, sir, there is no date except that on the news from Brunswick Corporation the headline is, "The following statement was issued by Brunswick Corporation April 27, 1972."

Mr. Seeley: Thank you.

Q. Did you recognize that this reserve that you had set up, Mr. Hanigan, was greater than was needed; did there come a time that you recognized that?

A. In 1968 we recognized that, yes.

Q. How much had been the reserve again?

A. There was one in 1964 of $15,000,000 and one in 1965 of $134,000,000.

[4183]

Q. And in 1968 you recognized that it was greater than necessary; is that right?

A. That's right.

Q. Do you remember the extent?

A. Approximately $8,000,000.

Q. It says here eight and a half.

A. All right.

Q. Now, then, that reserve was set up to cover losses, wasn't it, on these accounts receivable?

A. Yes.

Q. That we are speaking of.

Can you tell us now whether to a very large extent those losses haven't been wiped away over the years by income or revenue derived from the very repossessed equipment for which the reserve was set up?

A. They have not been wiped away, no.

We still have rather large losses that have not been wiped away.

[4184]

Q. Large in the sense of comparing them with the original reserve?

A. Large in any sense. Approximately $22 million.

Q. Was it against that $22 million that you set up a reserve of 150 million?

A. No, sir.

Q. What else?

A. We recovered some of our losses through sales of equipment and operation of equipment.

Q. You have recovered a great deal, haven't you?

A. Fortunately.

Q. Mr. Hanigan, in 1965 you were telling the proprietors that you were going to be in just to salvage, isn't that right?

A. That is correct.

Q. And you wanted the industry to understand, did you not, that you were going to come in and go out as soon as these centers were converted into good going businesses that could be sold, isn't that—

A. Yes, sir.

Q. —the meaning of your remark? But here and there you bought some centers, did you not, to serve as interceptors?

A. No, sir.

[4185]

Q. Between you and AMF, didn't you?

A. No, sir. We didn't buy any centers.

Q. When you say you repossessed, you repossess a machine, don't you, and the lanes?

A. Equipment; yes, sir.

Q. Equipment. When you go into Interstate, or any of the other 170 Brunswick owned and operated centers, you haven't just got equipment, have you?

A. Sometimes we re[illegible]sessed also other equipment, or bought it, at a bankruptcy [illegible]ale.

Q. But you have bowlers now in Emporia, Illinois—was it Emporia—Peoria; you have bowlers now in Peoria, Illinois, don't you, in a Brunswick operated center?

The Court: That proprietor didn't move. He is still in Peoria.

Mr. Hoffmann: He is still there.

The Court: Mr. Jones.

The Witness: I don't know Mr. Jones.

Mr. Hoffmann: Well, it is a hypothetical Mr. Jones, Mr. Hanigan. But he bowls in a Brunswick operated center.

Q. Now, you couldn't let him bowl, if all you had was title to the machine and lane, could you?

A. In most of these instances when we repossessed

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the equipment, we then negotiated with the man, or corporation, or whoever owned the building, and land, to try and lease it at a price that would enable us to make some money.

Q. You then leased the building?

A. Yes, sir; in most instances.

Q. In some instances you bought the building?

A. That is correct.

Q. The real estate. And you got hold, also, by some legal means or other, of the furnishings, didn't you?

A. Yes, sir.

Q. The carpeting, the settees, licenses—did you get licenses, liquor authority licenses, and the like?

A. I guess so. We have some. Must have gotten some.

Q. Liquor is an important part of this business, the cocktail bar in a bowling center is an important part of it, isn't it?

A. In some places it is; in others, it isn't.

Q. In most, isn't it; yields good revenue; you have to have a license to sell liquor, isn't that so?

A. Yes, sir.

Q. Almost throughout the United States. These other things Brunswick then acquired, a lease on the

[4187]

property, licenses when needed, furnishings of all sorts and conditions, I suppose, do you agree?

A. Yes, sir.

Q. And with it the leagues and the patronage of the bowlers who were accustomed to bowling at that bowling center, isn't that also so?

A. I didn't understand the beginning of that question.

Q. And Brunswick also acquired, at the same time as acquiring these other things that we have just mentioned, certain bowling leagues, bowling in the premises, and the patronage of individual bowlers who previously had been using the center, isn't that right?

A. If you mean acquired in the sense that we bought them, we did not. If they had been used to using it, of course, that was a consideration in evaluating the center.

Q. But if there were a league with a contract to bowl at the center, you would acquire that contract, wouldn't you?

A. I don't know. I never got into those details.

Q. You don't know the answer to that?

A. I don't.

Q. And when you took a lease, you acquired a

[4188]

lease, did you not?

A. The leases that we acquired were very short term, like two years, in most instances.

Q. Sometimes ten, weren't they?

A. In some instances, where we couldn't avoid them, yes.

Q. Now, sir, there have been some statements made at this hearing that a lease for property is the same thing as a management contract; do you understand that to be so?

A. We are talking about a different kind of lease now, I presume.

Q. Is there such a thing as a lease which you regard as a management contract?

A. I don't think that I can answer that question. I know that we have management contracts and I know that we have some leases. Whether the one is the equivalent of the other, I do not know.

Q. Now, sir, for quite a while most of the acquired centers, the bowling centers that were taken over and transferred to BCOD, and operated by BCOD, operated at a loss, didn't they, for quite a while?

A. Yes, sir. I am not sure that most of them did, but as a totality, they did; in total, they did.

Q. Then there came a time when it developed

[4189]

a positive cash flow, isn't that so?

A. Yes.

Q. And that is the point in time, according to your testimony, when the operation becomes profitable, is that right?

A. I did not say that. It does not become profitable when it develops a positive cash flow. At a later date it became profitable.

Q. Well, what else must it do to become profitable?

A. It must make enough money to cover depreciation.

Q. And whatever other costs are connected with it, is that right?

A. Yes, overhead and so on.

Q. Is it true that these hundred and seventy, or whatever the precise number is, bowling centers are now profitable investments of Brunswick?

A. Yes, sir.

Q. What is your opinion; is it your opinion that they become profitable because of increase in popularity for the game?

A. No, they become profitable for a variety of reasons. In some instances we shut down houses that we became convinced would never make it. In other places population trends have caught up with us. In

[4190]

other cases it is simply because they have been managed well. In other cases it is because the previous management just didn't want to pay us, and wouldn't, but kept the cash.

So there were a variety of reasons why we were able to turn them around.

Q. They are now profitable, that is your testimony?

A. Yes, sir.

Q. Is this the point in time in which the bowling industry generally, or the bowling operating industry generally seems to be perking up, doing better than it did in the '60's?

A. It has done better continuously through the '60's. There have been more bowlers. Precise figures are hard to come by. But it is my impression, and our impression, that the business never went away. People just thought it did.

Q. Well, if the business never went away, how can you explain the fact that—what is it?—9,000 pinsetters and lanes had to be repossessed by you and put into warehouses during the 1960's?

A. There were many people who entered the bowling business thinking it was the end of the rainbow. They found out that you had to work at it, and didn't

[4191]

work at it, or they were underfinanced, and consequently couldn't make a go of it from that standpoint.

There are others who just—I believe—went in it and took cash out of it, and never did pay any bills. There are a variety of reasons why we had to repossess equipment.

Q. Wasn't one of the reasons why you had to repossess that in a particular marketing area there were too many lanes servicing the population?

A. I don't know.

Q. You don't know that?

A. No, sir. I don't know how many lanes is too many.

Q. Well, if we have one lane for one person, two lanes for two persons, that would be enough, wouldn't it?

A. I would think so.

Q. And if we had 50 lanes for two persons, wouldn't you hold that that is too many?

A. That situation does not exist anywhere.

Q. Perhaps it exists in not so dramatic a form.

A. Possibly.

Q. Do you know what the relationship is between population and number of bowling lanes that you regard as economically healthy?

A. No, sir; because that varies by location.

[4192]

Q. Do you have any formula that you use in relation to that subject?

A. I do not.

Q. Do you know of any formula widely used within your own organization as to that?

A. No, sir; I don't.

Q. You do not?

A. No, sir.

Q. Did you ever hear of any as being used by Brunswick?

A. No, sir.

Q. Are you familiar with the phrase "evaluation report"?

A. Yes, sir.

Q. Do you know what it is?

A. In general I know what it is, an evaluation of a bowling establishment.

Q. Do you know generally that the evaluator indicates the number of potential bowlers, that is to say, the population of potential bowlers as against the number of lanes in these evaluation reports?

A. I have never seen an evaluation report.

Q. Does a formula like one to a thousand mean anything to you?

A. No, sir.

• • •

[4194]

Q. Just for a moment, Mr. Hanigan, I'd like to show you something entitled, "Evaluation Report No. 76," it is plaintiffs' Exhibit 10 in evidence, Brunswick's Evaluation Report about a center in LeMar—called LeMar, Inc. in Poughkeepsie, New York.

Would you be good enough to follow along with me.

Do you notice there is a heading, "Competition," and then an inscription of some bowling houses that are in that area?

The Court: What page are you on?

Mr. Hoffmann: I am looking at page 15, your Honor, what was called a synopsis of these houses, as follows, and then it mentions some houses, Hobo County Lanes, three miles from subject, and so on.

And if you turn the page to the top of page 16, "including the subject 26 lanes there are 125 effective lanes serving a present population of 97,300 persons. This is a lanes to person ratio of 780 to 1.

"The estimated proper lanes per person ratio in a market of this type is 1,000 to 1."

[4195]

Do you observe that at the top of the page?

A. Yes.

Q. Is this your first experience in seeing the Brunswick evaluation report?

A. I believe it is. I don't recall—

Q. Never seen one of these before?

A. No, sir.

Q. Never been called to your attention that in such reports an effort is made to establish the estimated proper lanes to persons ratio in the market?

A. No, sir.

Q. Mr. Hanigan, do you know anything at all about what's happened to the Bowl-O-Mat center in Pueblo, Colorado?

A. I do not.

Q. Do you know anything at all about what's happened to the Bowl-O-Mat center in Paramus, New Jersey?

A. No, sir.

Q. Do you know anything at all as to what happened to Holiday Bowl-O-Mat center in Wappingers Falls, New York?

A. No.

Q. Do you know anything at all about what's happened to the Bowl-O-Mat center, Paradise Lanes, in

[4196]

San Juan, Puerto Rico?

A. Maybe I can shorten this up. I don't know anything about Bowl-O-Mat lanes at all, any of them.

Q. Would that include the situation as it existed in Fort Lauderdale where at one time the plaintiff had a center?

A. It does.

[4197]

Q. Now, before the luncheon recess, I read to you a quotation, which you said was properly quoted, Jack Hanigan, "a Brunswick business must have a technical advantage or be a major factor in the market or both."

I now have in front of me a copy of an article in Business Week Magazine, the October 3, 1970 issue, page 16. There is a quotation attributed to you here. The paragraph starts—

Mr. Seeley: May I see it before it is read?

Mr. Hoffmann: Surely. Perhaps as I read, you can stand alongside of me.

(Mr. Seeley examines.)

Q. It starts, "Hanigan,"—then it has two numbers, which I think are designed to represent your age. And lest this be a trade secret of some sort, I'm not going to read it. I will just say, "Hanigan says that Brunswick"—

The Court: He can't be drafted. Ask him his age. He has no control over it.

Mr. Hoffmann: I know some ladies that have.

The Court: That's different.

Q. "Hanigan, 59, says that Brunswick 'must

[4198]

either have a technological edge, or a commanding or important position in the market.' "

Does that accurately report a statement of yours?

A. I don't recall it. It may be accurate.

Q. It is the part that I have marked in there.

(Shown to the witness.)

The Court: What is the relevancy of your age?

The Witness: I don't think there is any. I have no control over what they put in a magazine.

Mr. Hoffmann: A technical advantage or a controlling position in the market, your Honor, I submit—

The Court: No, you didn't hear me. I said what is the relevancy of his age?

Mr. Hoffmann: I'm so sorry. I think his age is irrelevant and I would be most happy to have a reference to it stricken, if Mr. Hanigan wants.

A. These are my sentiments.

Q. Do they remain your sentiments today?

A. They do.

• • •

[4203]

Q. • • • Have you made any policy decisions, your company, as to closing down the Brunswick bowling operation activity in the United States?

A. No, sir.

Q. Do you have any plan to cover the contingency of a close-down in the near future?

A. It does not look imminent, so we have not bothered to do it.

Q. You haven't bothered to get up a five-year plan on it about phasing out of the bowling business?

A. The bowling center operating group has a five-year plan every year.

Q. But does the current one or any past one include a phasing out of the operation of bowling centers?

A. I don't believe so.

[4204]

I haven't looked at it in detail.

Q. You would have heard, wouldn't you, if it did?

A. I think I would have, yes, sir.

Q. Is the matter pending today anywheres in the Brunswick organization as to whether or not Brunswick will leave the bowling operating business altogether?

A. Not to my knowledge.

Q. Now, sir, earlier in your cross-examination by me I referenced interceptors; do you recall?

A. I recall that you did, yes.

Q. I am now going to read to you from Plaintiffs' Exhibit 64 in evidence, which is the five-year plan for 1966 to 1970.

Mr. Seeley: Page, sir?

Mr. Hoffmann: Page 9.

Q. "In mid-1966 a team of men will be assigned—" I'm sorry, your Honor.

The Court: I have it.

Q. (Continuing.) "In mid-1966 a team of men will be assigned to look at potential markets for new installations of used equipment," and then I skip a few lines, and:

"Consideration will be given to locating such

[4205]

new centers as interceptors to outlying competitively equipped bowling establishments where such an installation would prove profitable to Brunswick."

Would you like to see this written out?
I have underscored the line.

A. Yes, I see it.

Q. Do you know what it means?

A. No, sir.

Q. No knowledge of it at all?

A. No.

Q. Did there exist any—withdraw that, please.

"Consideration will be given to locating such new centers."

At this point we are talking about a new Brunswick operated center; is that right?

A. You are.

Q. Well, this document is.

A. That document is, yes.

Q. And that document is a five-year plan of the Brunswick Corporation for the years 1966-70 of BCO Division, is that right?

Would you like to see the title?

A. I take your word for it.

Q. Thank you.

[4206]

"Consideration will be given to locating such new centers—" that's new Brunswick operated centers—"as interceptors to outlying competitively equipped bowling establishments."

Can you explain from your knowledge of the industry what would be a "competitively equipped bowling establishment"?

A. I assume it would be equipped with AMF equipment.

Q. They were the only significant competitive supplier of bowling equipment; isn't that so?

A. There were others, but they were not as significant as AMF.

Q. So then, if I may:

"Consideration will be given to locating such new centers as interceptors to outlying AMF equipped bowling establishments where such an installation would prove profitable to Brunswick."

Does that seem like a fair reading of this?

A. That's what it says there.

[4207]

Q. Yes. Do you have any idea what the word, "interceptor" means in this context?

A. I know what it means, but I don't know what it means there.

Q. I don't know if the Judge will permit this, but will you be kind enough to tell us what "interceptor" means?

A. It means to put something in between, to intercept someone else's trajectory or something of that sort.

Q. So consideration will be given to locating new Brunswick centers as something put in between outlying AMF equipped bowling establishments where such an installation would prove profitable to Brunswick; is that a fair reading of that?

A. Of that, yes.

Q. Did you ever have occasion to overrule this or prevent this from happening?

A. I never saw it before.

Q. It wasn't called to your attention?

A. No. It also wasn't done.

Q. How do you know that?

A. I have been told that it has not been done but I never saw that before.

Q. Didn't you see this in 1970 when you were

[4208]

examined in this courtroom?

A. Five year plans are that high. I did not see it.

Mr. Hoffmann: Excuse me just one second, your Honor.

The Court: I think the record should note that he made a gesture in his answer to the last question

with his right hand indicating approximately a height of three feet.

The Witness: Yes, sir.

Mr. Hoffmann: Your Honor, if I may point to this exhibit, P-64, which is the one we have in reference, it is itself a long, thick exhibit, but nowheres near three feet, if I may be permitted to say so.

The Witness: I'm talking about all of the five-year plans from all of the divisions of the company. Some of them are more voluminous than others.

Q. Mr. Hanigan, you are aware of the fact, indeed, you so testified, that Brunswick acquired its first bowling center in December of 1964; isn't that so?

A. That's right.

Q. Do you know what Brunswick's intention was when it acquired that first center, what was its intention

[4209]

in doing so?

A. Yes. It was to salvage our position.

Q. That is, the Brunswick Division?

A. Yes.

Q. Did it at the time also have the intention of acquiring the bowling centers?

A. Of course.

Q. And it in fact did so, didn't it?

A. Yes, sir.

Q. Do you recall that in 1970 I inquired as to this matter of you?

A. No, I don't recall.

Q. If I may, I will read to you your testimony then and ask you if you affirm it today.

The Court: Transcript, volume, page.

Mr. Hoffmann: Transcript is page 2102, the 1970 proceedings of April 15, 1970, volume 15.

Second line, "Question: Mr. Hanigan, what was Brunswick's intention when Brunswick acquired its first bowling center in December of 1964?

"Answer: Its intention was to conserve the assets of the company.

"Question: Did it also have the intention to acquire that bowling center?

[4210]

"Answer: It did in fact acquire it.

"Question: If it did, in fact, acquire it, it had the intention to do so, isn't that right?

"Answer: Yes, sir.

"Question: Is that also true of the second bowling center which was acquired by Brunswick, that is to say, that Brunswick in acquiring the center had its intention of doing what it did?

"Answer: Yes, sir.

"Question: And would your testimony be the same as to all 170 bowling centers now operated by Brunswick?

"Answer: Yes, sir.

"Question: In other words, that when Brunswick acquired them, it did it not by chance or accidentally, but with the intention of doing so?

"Answer: Yes, sir."

That's your testimony, and may I intersperse here do you still affirm the testimony which I just read?

A. Yes.

Q. Then I went on with this question:

"Question: Now, sir, when Brunswick for-

[4211]

gave a debtor, didn't demand that the debtor pay on time, did it do that by chance?

"Answer: No, sir.

"Question: It did it with the intention of forgiving, isn't that right, or extending credit some more?

"Answer: Extending, extending, yes, sir.

"Question: Now, when Brunswick refused to extend credit further and repossessed the equipment it did not do that accidentally, did it?

"Answer: No.

"Question: It did it intentionally, did it not?

"Answer: Yes, sir."

Do you affirm that?

A. Yes.

• • •

[4220]

Q. Sir, may I ask you whether or not you know with what intention Brunswick acquired a center called Interstate Lanes in the Bergen County, New Jersey, area?

A. I do not know about that particular one; no, sir; or any of them specifically.

Q. And may I ask you if you know with what intention Brunswick acquired Lodi Lanes and Fair Lawn Lanes in that Bergen County area?

A. I do not.

Q. May I ask you, sir, if you know anything at all about Brunswick's intention in respect of Brunswick's acquisitions of centers in the following markets: (1) The Fort Lauderdale, Florida, area, do you know anything about Brunswick's intention in acquiring centers there?

A. No, sir.

Q. (2) The area which might be called the Pueblo, Colorado, area, do you know anything at all

[4221]

about Brunswick's intention?

A. In all of these cases our intention, of course, was to protect the assets of the corporation.

Q. Do you know anything at all about the particular intention expressed at the time when these acquisitions we just referred to were made?

A. You mean the specific ones?

Q. Yes.

A. No, sir.

Q. I ask you, sir, if you know anything at all about the intentions which Brunswick had in forbearing to close down a center in San Juan, Puerto Rico, called Star Bowl?

A. I do not.

Q. Now, sir, do you know whether or not, when Brunswick failed to close down a center called Belmont Lanes in Pueblo, Colorado, its failure to do so had the effect of preventing a certain amount of bowling business going from that center, Belmont, to plaintiffs' center, Bowl-O-Mat, Pueblo?

A. I know nothing about it.

Q. You know nothing about it: And is your answer the same in respect to the effect of failing to close down centers in the other market areas I referred to just a moment ago in my questions?

[4222]

A. Yes, sir.

Q. Now, sir, do you know whether or not Brunswick has ever acquired a bowling center in a community in which, after it has made its acquisition, Brunswick has a hundred per cent of the bowling business in the community, do you know whether that has ever happened?

A. Yes, it has.

Q. You know that it has happened?

A. Yes.

Q. And do you know where?

A. Covington, Georgia.

The Court: I missed that. Mr. Bremer, read that.

(Record read.)

The Court: Thank you.

Q. What is the name of the center there?

A. I don't recall. It's the only one——

Q. How do you happen to know about that particular center?

A. We have a plant there.

Q. A manufacturing plant?

A. Yes, sir. And the manager asked us to keep it open, which we tried to do, and failed.

Q. Do you know whether or not in a town called

[4223]

Boonville, Indiana, Brunswick acquired a center called Lincoln and achieved 100 per cent of the market?

A. I do not.

Q. Do you know whether or not in a town called Huntingburg, Indiana, Brunswick acquired a center named Hunters and achieved 100 per cent of the market?

A. I know nothing about it.

Q. Do you know whether or not in a town called Washington, Indiana, Brunswick acquired a center called Laurel and achieved 100 per cent of the market?

A. I know nothing about that one, either.

Q. Do you know whether or not in a town or city called Holyoke, Massachusetts, Brunswick acquired a center called Holyoke and achieved 100 per cent of the market?

A. I know nothing about it.

Q. Do you know whether or not in the college town of Northampton, Massachusetts, Brunswick acquired a center called Northampton and achieved thereby 100 per cent of the market?

A. I do not.

Q. Do you know whether or not in a town of New Paltz, New York, Brunswick acquired a center called College and achieved 100 per cent of the market?

A. I heard something about that. I did not know it

[4224]

was a hundred per cent of the market.

Q. You did hear something about that. What did you hear?

A. I can't recall. I remember the name, because I was familiar with it.

Q. When you were being examined by Mr. Seeley earlier today you spoke of Brunswick only owning a small—very small percentage of the bowling centers of the United States, isn't that right?

A. That's correct.

Q. Does the circumstance that Brunswick owns only a small percentage of the bowling centers in the United States have any meaning to you in terms of what this case is about, what this lawsuit is about here?

A. I don't follow you. I don't know what you mean. It doesn't have any meaning to me, no.

Q. Do you know what this lawsuit is about, this case in which you are testifying now?

A. Generally speaking.

Q. Do you know—

A. Would you like me to tell you what I think it is about?

Q. Yes, I am asking if you know.

The Court: Be careful.

[4225]

A. I think that your client is trying to say that we have no business to be in the bowling business, which I can't understand.

[4226]

Q. Do you know anything more about the case than that?

A. That's all.

Q. Do you know anything about the nature of the charges that are made against your company?

A. No, sir.

Q. Do you know whether or not, Mr. Hanigan, it has been the effect—and, mind you, I use the word, "effect,"—it has been the effect of any Brunswick acquisition in the United States to exclude another bowling center from doing business in the area where the acquisition was made?

A. I would not believe that to be so.

Q. Do you know? is my question.

A. I don't know.

Q. Do you know whether or not in any marketing area in the United States it has been the effect of a Brunswick acquisition of a bowling center to partially exclude—

that is to say, to deprive an owner of some of the business which he would otherwise have enjoyed if Brunswick had not operated their centers in marketing area?

Mr. Seeley: I object, your Honor. It is counsel's definition that says that preventing another center from getting part of the

[4227]

business is a partial exclusion. It may be simply competition, which has nothing to do with exclusion, in the sense of—

The Court: Can't he preface the question by saying, "Do you know?" If Mr. Hanigan doesn't understand what he means, let him say he doesn't understand the question.

No, I will permit it. Repeat the question, Mr. Reporter.

(Question read.)

The Court: Do you understand the question?

The Witness: I do not know.

The Court: "I do not know."

Q. Now, Mr. Hanigan, let us suppose that Brunswick acquires a center in—

The Court: Peoria.

Q. —Peoria, Illinois, operated by a Mr. Jones, Tom Jones—

The Court: You don't know Mr. Jones, do you?

The Witness: No, I don't.

Q. (continuing) Let us suppose that Brunswick ac-

quired a center across the street from Mr. Tom Jones' center in Peoria, Illinois. And let us suppose further

[4228]

that Brunswick decides it is going to lower the price for bowling by five cents, from 60 cents to 55 cents, at this center in Peoria, Illinois.

Can you think of any reason why Brunswick would be unable to do that?

A. If the people followed the policy that I have laid down, they would not be able to do it. And—

Q. If they followed the policy.

A. Yes, sir.

Q. But assuming they didn't follow the policy, can you think of any reason why Brunswick would be unable at that center to lower the price a nickel?

A. One can always lower a price. It is harder to raise it.

Q. One could always. And, indeed, one could lower the price of a particular bowling center and carry the operation at a loss for a long time, couldn't he, if need be, if he wanted to?

A. Could be, yes.

Q. Yes. If that one were Brunswick.

A. If that one were anyone.

Q. Well, if that one were Tom Jones in Peoria, Illinois, a man who is just eking out his living from a bowling center equipped with Brunswick automatic pinsetters and lanes, for which he must

[4229]

pay a sizeable sum of every game back to Brunswick, his competitor, he might go broke, if he tried to control the price of the lineage, isn't that so?

A. He might.

Q. Has anybody spoken to you concerning the significance of the existence of the power to fix price in the law?

Mr. Seeley: In what?

Mr. Hoffmann: In the law.

The Court: Repeat the question, please.

(Question read.)

The Court: Have they?

Mr. Seeley: I object, your Honor.

The Court: No. Has anybody spoken to you about that?

The Witness: Not that I recall; no, sir. Except the Wage and Price Board.

The Court: Except what?

The Witness: Except the Wage and Price Board.

The Court: Phase I and Phase II.

The Witness: Yes, sir.

Q. Not otherwise, just in that connection. Has anybody, sir, spoken to you about the significance in the law of the existence of the power to exclude

[4230]

competitors from the marketplace?

A. No, sir.

• • •

[4233]

RE-DIRECT EXAMINATION.

By Mr. Seeley:

Q. Mr. Hanigan, Mr. Hoffmann elicited from you the statement that Brunswick has no plan at the present time

to close down the bowling centers which BCOD operates in the near future.

Do you know of any business reason why it has no such plan?

A. Well, we are making money with them. They are an asset of the corporation, and it's my job to make sure that the stockholders' interests are taken into account.

It would be foolishness for us to close down these centers as long as we can make money with them.

Q. What would be the financial effect on the stockholders if you closed them down?

A. Well, in the first place, we would have considerable expense in closing them down, paying separation pay to some of the people involved, I would presume, we would have to, in moving the equipment to a warehouse, and in addition to that, at this time we have some leases which we could assign to a new owner but which we cannot breach.

So that there would be considerable expense in addition to the loss of profit that we are making.

Q. What are Brunswick's five-year plans, Mr.

[4234]

Hanigan?

A. A five-year plan is a plan which is submitted each late spring which in effect tells the things that the Division hopes to do or fears might happen.

They are fairly loose things, they are in no way a budget. The only real sure thing about them is that as soon as they are issued, they are out of date and have to be continuously changed.

Q. Well, if there is in a five-year plan a suggestion as to something which Brunswick might do in the future, does that constitute a policy or program of Brunswick?

A. No.

Q. What has to happen before any such suggestion can become a program?

A. Well, it would, in the first place, have to be re-examined by the Division at the time when it would be considered for implementation.

And in the second place, approved by the Division manager, and in some instances, by myself or the Board of Directors if capital was to be employed.

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[4235]

Q. Do you recall answering questions put to you by Mr. Hoffmann about Brunswick's acquiring bowling centers?

A. Yes.

Q. When Brunswick repossesses pursuant to rights in its conditional sales agreements, what does it acquire?

A. It acquires bowling equipment.

Q. Now, is that a bowling center?

A. No, sir.

Q. And what more than must Brunswick do if at the place where those repossessed pinsetters and lanes are located it wishes to have a bowling center which it can operate?

A. Well, in the first place, it would have to arrange to lease the premises on as short a term as possible with renewals.

In the second place, and very often, we would have to replace carpeting and other furniture that has nothing to do with bowling at considerable expense.

And in the third place, we would have to develop

[4237]

the business all over again because the places that we do

take over are bankrupt and the business has run downhill, mostly.

Q. Do you know of any instance, Mr. Hanigan, where Brunswick has acquired by purchase a bowling center business otherwise than when the previous operator of that business was hopelessly delinquent in his payments to Brunswick under a contract for the sale of equipment?

Mr. Hoffmann: I object to the form of the question.

(Record read.)

The Court: It is quite a question. I will permit it.

Do you understand the question?

The Witness: I understand it, but we don't acquire a business, we acquire the pinsetters and we have to then make a business out of it, but in no instance do I know of this happening where the proprietor was not hopelessly delinquent.

• • •

[4238]

Q. Mr. Hanigan, do you know whether or not since BCOD was organized Brunswick has in some cases repossessed equipment and has not thereafter operated the bowling center business at that location?

The Court: Do you know of any?

The Witness: I know that we sold many of the places that we have repossessed in place.

Now, where those specific places were, I do not know, but I do know that many of the repossessions were sold in place.

[4239]

Q. Do you know whether or not since January 1, 1965, any equipment after repossession has been removed from the premises?

A. Oh, yes, because we did build up an inventory of used pinsetters.

Q. Now, despite the fact that you do not know by name or otherwise individual bowling centers, do you regularly receive and review statistical reports on the operation of BCOD?

A. If by statistical you mean lineage reports, and that sort of thing, I do not.

The Court: The overall picture financially speaking.

The Witness: Financially speaking, I certainly do.

Q. Do you receive any reports about the number of centers it is operating?

A. No, sir.

Mr. Seeley: No further questions.

The Court: Any re-cross-examination?

Mr. Hoffmann: Yes, sir.

RE-CROSS-EXAMINATION.

By Mr. Hoffmann:

Q. Do you know, Mr. Hanigan, whether or not the Rahway center was hopelessly delinquent at the time

[4240]

Brunswick took a lease for the premises?

A. I do not.

Q. Do you know whether or not the Belmont center in Pueblo, Colorado, was hopelessly delinquent at the

point of time when Brunswick took over the operation of Belmont?

A. I do not.

Q. Do you know whether or not any of the centers involved in the areas of Poughkeepsie, New York, and surrounding, Paramus, New Jersey and surrounding, Fort Lauderdale, Florida and surroundings, and Pueblo, Colorado, were hopelessly delinquent at a point in time when Brunswick took them over?

A. I am confident they were or they wouldn't have been taken over.

Q. But you don't know, do you?

That's your testimony?

A. That's right.

Q. By the by, if Brunswick was so bankrupt at 1965, where did it find that 400 and what was it, 90-some thousand dollars with which to buy AIBC?

A. I didn't understand the question.

The Court: Lay the foundation first.

Q. Do you know anything about Brunswick buying up some 26 centers at a bankruptcy sale in 1965?

[4241]

A. I have heard about it, yes.

Q. Do you know that the name of the bankrupt chain was called AIBC?

A. Yes.

Q. Do you know how much money it cost Brunswick to buy those centers?

A. I do not.

Q. If I put it to you that it was 490—

The Court: 479.

Q. —$479,000, according to an exhibit introduced by Brunswick, can you tell us where it got that money to buy those centers in 1965?

A. Out of the general funds of the corporation.

Q. It had the funds to do it; is that right?

A. Yes, sir.

• • •

[4257]

DANIEL PARKE LIEBLICH, having been previously duly sworn, was recalled on behalf of the Plaintiffs and testified further as follows:

The Court: You are still under oath, Mr. Lieblich.

The Witness: Yes, sir.

DIRECT EXAMINATION.

By Mr. Hoffmann:

Q. Mr. Lieblich, I don't think it is necessary for you to reidentify yourself to the Court and jury. But I ask you to tell us, as crisply as you can, whether you have any background experience in real estate law?

A. Yes, sir.

Q. What is that?

A. Prior to the time that I devoted most of my efforts as a lawyer to running Treadway Companies, and its predecessor, my specialty of law was real estate and corporate activity. I handled many real estate syndications over many years, and certainly leases, and purchasing real estate, and anything to do with real estate, in which I specialized.

[4258]

Q. In the course of your practice of law did you have occasion to examine many leases on real property?

A. Yes, sir; I examined many, I drew many. I still get all the leases of our own company. I help draw the leases of Treadway these days.

Q. And in connection with your function as president of NBO and Treadway, have you had occasion to negotiate leases?

A. Yes, sir; many occasions.

Q. Do you know what a lease is, sir?

A. Yes.

Q. Do you have in front of you the submission made by Mr. McNeill on behalf of Brunswick yesterday of documents—

A. Yes, sir.

Q. —which were referred to as leases?

A. Yes, there were six lease agreements on BCOD centers that Mr. McNeill turned over to you, Mr. Hoffmann.

Q. What is a lease; can you tell us what a lease is?

A. Well, a lease is when someone rents something and pays something for it.

Q. Pays somebody for the use of his property?

A. Yes.

[4259]

Q. Is what you have in your hand a lease?

A. Yes, sir; each of these six Brunswick leases are on a printed form. Each of the six have the identifical printed form, which bears on the bottom 1600.20 R 3-67 1 of 6. It's a printed agreement called Brunswick Bowling Establishment Lease. And all six of these leases are identical in the basic format.

Q. May I have one, please?

A. Yes.

(Handed to Mr. Hoffmann.)

Mr. Hoffmann: I ask that this form identified by the witness be marked as Plaintiffs' Exhibit 81 for identification. It is a copy of a lease with a covering letter dated June 25, 1970, between Vincent A. Sorbello and Brunswick.

(Exhibit P-81 marked for identification.)

Q. Do you know what a management contract is, as that term is understood in the bowling industry?

A. Well, I think in its broader context, a management agreement is a management agreement.

Q. When you say a management agreement, describe for us what is such an agreement?

A. In simple essence—

The Court: Let me interrupt you, Mr. Lieblich.

[4260]

(Short interruption while another matter is handled by the Court.)

The Court: All right, Mr. Hoffmann.

Q. Now, in a management contract, what is the heart of it?

A. One party agrees to supervise the operations of someone else's property or business, for a fee.

Q. And how would you differentiate a management agreement from a lease?

A. They are almost the antithesis—the very opposite of one another. Under a lease you pay someone something for the use of his property. In a management agreement you get a management fee for the supervision of the operation of someone's property. Under a lease, particularly when it is a lease of a going business, the tenant enjoys the profits of the business, if there is a profit, but if there is a loss, the tenant absorbs the entire loss.

In a management agreement, almost normally and certainly specifically with the Brunswick management agreements that I have examined, Brunswick gets a fixed fee, and then a fee depending upon the profitability of the operation. But they do not assume any liability for any loss.

So there is an absolute difference between the

[4261]

two. In one they get a fee, regardless of the profitability of the operation. Under a lease, if they do well by running the business, they get a profit; if they do poorly, they lose the money. But the landlord will always get the rental provided for in a lease agreement.

[4262]

Q. In other words, the landlord doesn't care whether the tenant is rich or poor, he insists on getting paid his rent?

A. Well, I think the landlord cares, but nonetheless, he wants to get paid.

Q. In a management agreement, it is different?

A. Yes.

Q. Can you just list briefly some others, if you can think of any now, between a lease and management agreement?

A. Well, a lease is a valuable asset, it is an acquisition of something.

A lease can be recorded in the county courthouse.

And in the Brunswick lease agreements there is a provision that they can be recorded.

It is an asset that can be sold. A lease can be transferred or assigned.

The Court: Or pledged as collateral?

The Witness: Yes.

It is an asset that can be put on a balance sheet and can be written off for tax purposes for getting some benefit taxwise for the value of a lease.

Q. So that when someone acquires a lease, he acquires an asset; is that right?

[4263]

A. Yes. In our company we have any number of leases which we consider to be extremely valuable assets.

Q. Now, sir, did you have occasion to examine the Rahway arrangement which Brunswick produced for us?

A. Yes.

Q. Do you have that with you?

A. Yes, I do, sir.

Q. Is that Plaintiffs' 67 in evidence?

A. Yes.

Q. Tell us, please, your opinion as to what form of transaction the Rahway agreement is?

A. It says it is a lease.

Q. And it is a lease?

A. It says Brunswick bowling establishment lease.

The next paragraph, it says, "This lease dated July 1970 between Rahway Rec, the landlord, and Brunswick, called the tenant," then it goes on to describe the normal landlord and tenant relationships that one would find in a lease agreement.

It is also acknowledged by Mr. Rudo for Brunswick in the presence of one of the attorneys of Brunswick as a lease. He acknowledges that Brunswick signed it as a tenant.

Q. Now, there isn't any doubt in your mind that this is a lease; it looks like a lease, does it

[4264]

feel like a lease?

A. It is a lease, sir.

Q. Now, what is there, if anything, in the Rahway lease which could possibly lead anyone to describe it as a management agreement?

A. From a legal standpoint?

Mr. Seeley: I object to the form of the question.

(Record read.)

The Court: No, sustained as to form. Rephrase it.

Q. Mr. Lieblich, you have read the Rahway agreement closely?

A. Yes.

Q. Is there any provision in that agreement which in your opinion makes Brunswick the manager of the center for Rahway Recreation?

A. No, sir.

Q. Contrary-wise, is there anything in the agreement which makes Rahway a manager of any sort for Brunswick?

A. No, sir.

Q. Tell me, did you notice that there existed in the Rahway agreement an option?

A. Yes.

[4265]

Q. Was that an option running in favor of Brunswick?

A. There were several options in there.

There was one option whereby Brunswick has the right to purchase the cocktail lounge, under the lease, Brunswick specifically did not lease the area of the cock-

tail lounge which the owner was continuing to operate for itself.

Brunswick has an option to purchase the cocktail lounge business. I assume this is something to do with the operation of the New Jersey law.

There is an additional option whereby Brunswick has the right to purchase the land and building.

Q. The option to purchase, is that the one about which we heard testimony the other day that Brunswick has suddenly written a letter cancelling it?

A. Yes, sir.

Q. Did you have a chance to examine these leases closely, the ones that were handed over yesterday by Brunswick?

A. Yes.

Q. Tell us, please, if you can, what judgment were you able to formulate about the length of the terms of the leases?

[4266]

A. Well, they vary a bit.

This one, Rahway, which is BCOD No. 391 on one of our exhibits, is for a seven-year period with renewal options for Brunswick totalling an additional 20 years.

The one in El Cajon Bowl, which under our exhibit was Brunswick's operation No. 378, is 34 months with option to Brunswick to renew for an additional period of 13 years.

The one, the lease on James Lanes, which on our exhibit was Brunswick operation No. 388, is for a basic period of three years, again with renewal options for Brunswick of additional periods of 17 years.

Q. Does that mean, when you speak of these additional options as in this last case, Brunswick can, if it

pleases, have a lease for 20 years, that is, the original three plus 17?

A. Yes, sir.

Q. And the landlord can't prevent that?

A. There is no provision for the landlord to prevent it.

There are only two more. One is James Lanes—excuse me. Did I just testify to James?

Q. Yes, you mentioned it.

A. Another one is Marshfield, Mountain Lanes, which

[4267]

is No. 387 on the spread sheet.

This is for a period of three years, again with renewal options for Brunswick for an additional period of time for 17 years.

And the last one is Gladstone, Missouri, which was BCOD operation No. 397.

This is for a period of five years with Brunswick renewal options for additional periods of 15 years.

Q. Thank you, Mr. Lieblich.

By the way, are you on the Brunswick mailing list?

A. Yes, sir.

Q. Is plaintiffs' 80 for identification a document which you received in the mail?

A. We are on the Brunswick mailing list for stockholder information purposes.

Q. Is this a document which is mailed to you?

A. Yes, it was mailed to our company, which is—yes.

Mr. Hoffmann: Your Honor, I'd like to offer into evidence Plaintiffs' 80. This is the Hanigan stockholder letter with the attached news from Brunswick.

It was identified in the course of the cross-examination of Mr. Hanigan.

[4268]

The Court: Yes?

Mr. Hoffmann: I'd now like to offer it into evidence through my own witness.

The Court: Do you want to be heard, Mr. Seeley?

Mr. Seeley: No objection.

The Court: Into evidence.

(Exhibit P-80 received and marked in evidence.)

Mr. Hoffmann: 81, the Sorbello bowling establishment lease, which was identified through this witness, I'd like also to put into evidence.

The Court: That's the lease Mr. McNeill produced?

Mr. Hoffmann: Yes.

The Court: Into evidence.

(Exhibit P-81 received and marked in evidence.)

Mr. Hoffmann: Now, can we put in one of these, your Honor, about which the witness has just testified?

I ask to have received in evidence as Plaintiffs' 82 a lease dated February 27, 1970, between Felker and James' Lanes, Felker property in James' Lanes, together with a covering letter

[4269]

from Brunswick to something called BIC Properties.

The Court: That's another instrument produced by Brunswick?

Mr. Hoffmann: Yes.

The Court: Into evidence.

(Exhibit P-82 received and marked in evidence.)

Mr. Hoffmann: If there are any handwritten markings on these, I didn't check through them to see, I would ask that they be disregarded.

The Court: Later on.

Are you finished with the direct examination?

Mr. Hoffmann: I just have some hemstitching in this matter.

The Court: How about a little knitting?

Mr. Hoffmann: Just a short matter and it is highly technical, but I thought I'd do it.

By Mr. Hoffmann:

Q. Mr. Lieblich, from your knowledge of the operation of Brunswick operated centers and Brunswick—withdraw it.

From your knowledge of Brunswick equipped centers can you state for us whether a purchaser of Brunswick pinsetters and lanes in the normal course after the purchase is made continues to have a consider-

[4270]

able amount of business with Brunswick, his supplier?

A. Yes, sir.

Q. What is the character of that?

A. Well, in different categories, Brunswick's field representatives and sales representatives would normally be in a bowling—a Brunswick center, certainly every six weeks.

Lanes are often resurfaced by Brunswick crews, that was our former experience, every year we used to have Brunswick do our lanes with their crews.

Pins are purchased from Brunswick's main office, and they are shipped into the center.

Q. Where is the main office, by the way?

A. It is in Chicago, or it is now in the suburbs of Chicago.

And pinsetter parts were bought with frequency, and they are still, c.o.d. notwithstanding.

Q. Are those things part of the regular servicing or dealing between Brunswick and its customers?

A. Yes.

Q. And as for the equipment itself, where is it made, do you know?

A. I believe it is made in Muskegon, Michigan.

Brunswick has a huge plant there.

[4271]

They ship from there to the various Brunswick customers throughout the United States?

A. Yes.

Q. One final question, sir: In your opinion when Brunswick acquires a management agreement is that an acquisition of an asset?

A. Oh, yes. I have looked at their management agreements and they seem to me to be the same type of assets that we consider when our company has management agreements.

I have read the management agreements that Mr. McNeill turned over to you, Mr. Hoffmann. There are a list of 53 that they have had, some have been terminated.

There is in these management agreements a basic fee. I am looking now at the last form, which is 1973, that I gave you, Mr. Hoffmann.

Under this management agreement Brunswick gets a basic management fee of $12,000 per year, and then they get an additional revenue through management fees, if the

gross revenues of the center which they manage attain a certain level, and then they receive 50 per cent of the profits from the center which they manage.

So I would say, sir, this is an extremely valuable asset that emanates from not just one management

[4272]

agreement but the 53 which they have had and those which they still do.

Mr. Hoffmann: Before you step down, your Honor, I'd like to also have put into evidence a two-page letter, option agreement, June 25, 1970, between Sorbello and Brunswick, handed over to me a few minutes ago by counsel for the defense.

Mr. Seeley: No objection.

(Exhibit P-83 received and marked in evidence.)

Q. Give me the most recent agreement you have there?

A. Yes. This is a form entitled "Brunswick Corporation, Management Agreement."

The date on the bottom, April 1973, and the top it says 1973 form.

Q. Was your examination of this agreement part of the basis for your remarks about the management agreement in your testimony?

A. Yes.

Mr. Hoffmann: Your Honor, I will ask that this go into evidence, form called a 1973 form of Brunswick Corporation management agreement presented to the plaintiffs by defendant sometime

[4273]

yesterday.

Mr. Seeley: No objection.

The Court: Into evidence.

(Exhibit P-84 received and marked in evidence.)

Mr. Hoffmann: No further questions.

CROSS-EXAMINATION.

By Mr. Seeley:

Q. Does plaintiff Treadway Companies have any management agreements for any bowling centers?

A. Yes, sir.

Q. How many are bowling centers which Treadway Companies, Inc., manages?

A. There are five.

Q. Where are they located?

A. They are located in Richmond, Indiana; in Milford, Connecticut; in Stamford, Connecticut; in Nashua, New Hampshire; and in Greenfield, Massachusetts.

Q. Is five the total number that Treadway Companies has ever managed, or have there been more?

A. There have been a few more.

Q. How many more?

A. There was one in Lanecrest, Ohio; there was one in Manchester, New Hampshire; and some years ago for a very short period of time there was one in West Hampton,

[4274]

New York.

Q. And who were the other parties to these management agreements?

A. United Bowling Center was the owner of a corporation, the management agreements were with the companies in the locations I have described.

Q. For all of these things?

A. Yes.

Q. Does Treadway Companies have any interest in United Bowling Centers other than the management agreements?

A. Yes, it does.

Q. What is the nature of the interest?

A. It has a stock interest in United Bowling Centers.

Q. What percentage of the stock of United Bowling Centers does it own?

A. Approximately 47½ per cent.

Q. Does it have any options to acquire any more?

A. No.

Q. For how many years has Treadway Companies been operating bowling centers which belong to subsidiaries of United Bowling Centers?

A. Since about 1965.

[4275]

Q. And for how long has Treadway had a stock interest in United Bowling Centers?

A. The stock interest was acquired approximately eight months after the management contracts were entered into.

Mr. Seeley: That's all.

Mr. Hoffmann: Your Honor, before the witness steps down, I just want to put in a few more to complete my day.

These are two annual reports of Brunswick of which some reference was made in the testimony for 1971 and 1972.

Mr. Seeley: Brunswick annual reports? I certainly can't object to that.

(Exhibit P-85 and Exhibit P-86 received and marked in evidence.)

Mr. Hoffmann: P-85, the annual report for 1971 of Brunswick, and P-86, the annual report for 1972 for Brunswick.

Then, if your Honor please, in the course of my cross-examination of Mr. Hanigan yesterday I showed Mr. Hanigan a copy of the Investor's Reader which contains an article about Brunswick, and I asked Mr. Hanigan several questions concerning quoted matter that was in the article

[4276]

that the witness agreed that he was properly quoted, and it is for that reason that I offer it into evidence, the Investor's Reader of July 1, 1970.

Mr. Seeley: No objection.

(Exhibit P-87 received and marked in evidence.)

Mr. Hoffmann: I have no further questions of Mr. Lieblich.

Mr. Seeley: No further questions.

(Witness excused.)

Mr. Hoffmann: Plaintiffs rest.

The Court: Defendant rests?

Mr. Seeley: Defendant rests, your Honor.

(Short recess.)

• • •

[4330]

The Court: Before we go any further, remaining before the Court for its determination this morning is the motion of the defendant for a directed verdict and the plaintiffs' counter motion for a directed verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure.

As the Court has previously stated, the

[4331]

standard for granting a motion pursuant to Rule 50 as stated in Brady v. Southern Railway Company, 320 U. S. 478, 479-80, 1943, to wit, the motion can only be granted when there can be but one reasonable conclusion as to the verdict.

Guided by this standard and the principle that the party against whom the motion is made is entitled to have all of the reasonable inferences that can be drawn from the evidence, Gizzi v. Texaco, Inc., 437 F. 2d 308, Third Circuit, 1971, the Court has considered the arguments of both counsel in support of their respective motions, and having reviewed the evidence, however, the Court is of the opinion that neither movant has carried its burden under Rule 50.

Plaintiffs' motion for a directed verdict and defendant's counter motion for directed verdict are denied.

• • •

[4491]

Mr. Seeley: May it please the Court, Mrs. Smith, and gentlemen of the jury:

• • •

[4557]

Naturally the only dollar evidence in the record as to damages is the plaintiffs' evidence. The defendant is not going to introduce evaluation of damages which they don't think exist at all.

But if you should find that there was any damage for what plaintiffs sought to recover, you are not bound by the plaintiffs' figures. After all, it is opinion evidence and you are entitled to consider it in light of all of the circumstances in the case and see whether you think the opinions are reasonable, whether the dollar valuations are based upon facts from which they can reasonably be inferred.

Let me give you one example of reasons why you might have second thoughts about certain

[4558]

damage claims. In Paramus, New Jersey, for instance, the testimony is that if one or two or three of the Brunswick houses closed down, Paramus Bowl-O-Mat would enjoy an increase of, how much, from 136,000 to 150,000 more revenue per year.

Why don't we ask ourselves, what happened to all of the bowlers who used to bowl in these centers that have closed down, why aren't all of those bowlers crowding the rafters of Paramus Bowl-O-Mat and giving it all of the business it can handle; in other words, it is just not necessarily true that when one center closes down another one gets a great share of it, especially like in a crowded community like Bergen County where the bowlers have a great many choices of places where they want to bowl.

And if a bowling center has gone as long as Paramus and still is not attracting enough bowlers to be profitable, you are entitled to question whether this magic leap to prosperity would occur if one, two or three of the Brunswick centers closed down, and you are also entitled to consider that if Brunswick gave up the operation of one, two or three of those houses, that does not necessarily mean they would close down.

[4559]

Suppose Brunswick sold them to somebody, somebody else ran them.

Then where would the 136,000, what not, come into Paramus Bowl-O-Mat?

So that there is no gold plated guarantee of instant profits in the prospect that Brunswick might be forced out of the bowling center business.

• • •

[4655]

The Court: Mr. Pfeifer, your foreman, ladies and gentlemen of the jury, we have arrived at the stage in these proceedings where it is my duty to give you instructions as to what law or laws control in this type of case and regardless of whether or not you agree with the law as given to you by the Court, you must follow and be guided by it, and apply it to the facts in this case.

At the outset, I am sure counsel agree with me, when I say to you that the Court is very appreciative of the services that you have performed as jurors and we thank you. Another point, before I forget it, I have a habit of speaking rapidly. If I do, if you will raise your hand, I will take it as a signal to slow down.

I'm sure you'll agree when I say that this case is not the ordinary run-of-the-mill case. It is quite different and why do I say this—because it involves alleged violations of

what are known as the Clayton Anti-Trust Act and the Sherman Anti-Trust Act.

These are statutes passed by Congress and this Court has what is called jurisdiction in these type of cases. Perhaps you are wondering why the laws in question are called the Sherman

[4656]

Anti-Trust Act and the Clayton Anti-Trust Act. They are named after the legislators who introduced or played a part or were instrumental in their passage.

As you know by now, this is an action by the parent company, Treadway Companies, Inc., formerly named National Bowl-O-Mat, and the subsidiaries of the parent company, i.e., corporations known as: Holiday Bowl-O-Mat, Poughkeepsie, New York (near Wappingers Falls); Paramus Bowl-O-Mat, Paramus, New Jersey; Paradise Bowl-O-Mat, San Juan, Puerto Rico; Pueblo Bowl-O-Mat, Pueblo, Colorado; Indianapolis Bowl-O-Mat, Indianapolis, Indiana; and Treadway Companies, Inc. on behalf of Fort Lauderdale Bowl-O-Mat, Fort Lauderdale, Florida (now out of business) and Treadway Companies, in itself, in which damages and loss of profits are claimed under Section 2 of the Sherman Anti-trust Act and Section 4 of the Clayton Anti-trust Act from the defendant Brunswick Corporation.

Section 15 of the anti-trust act provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in

[4657]

any district court of the United States *** for damages."

The defendant, as I have told you, is also charged with violation of Section 2 of the Sherman Act by reason of alleged monopolization of the bowling center business in five areas:

Poughkeepsie, New York; Paramus, New Jersey; San Juan, Puerto Rico; Pueblo, Colorado and Fort Lauderdale, Florida (through Treadway), the parent company, and Treadway itself, in each of which a bowling center is or was operated by one of the plaintiffs, and one or more bowling centers is or was operated by defendant (except San Juan).

Defendant is also charged with attempted monopolization in these areas, in each of which a plaintiff operates a bowling center, but defendant does or did operate a center, except San Juan and Indianapolis Bowl-O-Mat.

Now, Section 2 of the Sherman Act provides:

> "Every person who shall monopolize, or attempt to monopolize any part of the trade or commerce among the several states shall be guilty of violating the law."

The defendant is also charged with violation

[4658]

of Section 7 of the Clayton Act (15 U. S. C. 18) by reason of defendant's acquisition of bowling centers in Pueblo, Poughkeepsie and Paramus.

Section 7 of the Clayton Act, known as U. S. C. Section 18 provides:

> "No corporation shall acquire, directly or indirectly, the stock or assets of another corporation where the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly."

As I told you when this case commenced, the defendant denies all these charges and claims for damages and further alleges that it has not violated the anti-trust laws nor has it caused the plaintiffs any damages. In other words, the defendant states that it has not committed any

act or acts violative of the anti-trust laws nor has it ever attempted to do so.

The Court has separated the following plaintiffs from this case: Saginaw Bowl-O-Mat, Inc., Muncie Bowl-O-Mat, Inc., Score Lanes Bowl-O-Mat, Minneapolis Bowl-O-Mat, Inc. and Des Moines Bowl-O-Mat, as a matter of law, leaving Treadway companies, Inc. on behalf of itself, and Fort Lauderdale Bowl-O-Mat; Holiday Bowl-O-Mat;

[4659]

Paramus Bowl-O-Mat, Pueblo Bowl-O-Mat, Paradise Bowl-O-Mat and Indianapolis Bowl-O-Mat as co-plaintiffs.

In the event repetition is found to exist in this charge, I must ask you to forgive the Court. This is going to be a lengthy charge, and I apologize for it.

When I mention the defendant, I am referring to Brunswick Corporation which includes BCOD, a division of Brunswick Corporation.

Let me clarify the pleadings in this case. Originally, the Complaint alleged three claims for relief. The first claim has been decided as a matter of law. You are not concerned with it at all. You are asked to decide in this case the second and third claims. The second claim charges monopoly and attempt to monopolize. The third claim charges a violation of the acquisition section of the Clayton Act.

[4660]

I emphasize that this action is here in this court only on a charge of violations of the antitrust laws.

You, members of the jury, are the sole judges of the facts. If, in these instructions, any rule, direction, or idea be stated in various ways, or any of the evidence is discussed, no emphasis is intended by me and none must be inferred by you. For that reason you are not to single

out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all of the instructions as a whole and to regard each in the light of the others.

But it is my function and my duty to instruct you, the jury, as to the rules of law that must govern the disposition of this case. You, then, are obligated to take the law from the Court, and to follow the Court's instructions as to the law. You are to analyze the evidence impartially, without prejudice, sympathy or bias for or against the plaintiffs or the defendant.

The term "every person" includes not only every individual, but also every corporation, partnership or other association or organization of every kind and character.

[4661]

A corporation is in law a person, but of course it cannot act otherwise than through its directors or officers or employees, or other agents.

Every act of an agent on behalf of or in the name of the corporation, if done within the scope of the agent's authority, is in law the act of the corporation itself.

I repeat, the claim for damages here asserted by the plaintiffs is based upon the applicable provision of the antitrust laws, which provides:

"Any person who shall be injured in his business . . . by reason of anything forbidden in the antitrust laws may sue therefor . . ."

This statutory provision reserves to any person or corporation a right of action for an injury to business proximately caused by any violation of the antitrust laws. Such a person or corporation may recover damages for the injury to business upon proof by a fair preponderance of the evidence: First, that there has been a violation of

the law; and second, a consequent injury to business of which the violation is the proximate cause.

The term "preponderance of evidence," which shall be used throughout these instructions, means

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the greater weight of credible evidence considered in its entirety. The number of witnesses called by one party or the other is not necessarily determinative of the weight of the evidence. It is, however, a factor which may be considered by you where the witnesses have had the same opportunity for observation and are believed by you to be of equal credibility.

There are other factors which may and should be considered by you in your determination of the weight of the evidence, to wit, the persuasive quality of the testimony and its probative value. You will appraise the evidence in the light of these several factors in determining what weight, if any, is to be given it.

There is a preponderance of evidence where its persuasive quality is such that it best accords with reason and probability.

Now, as jurors you are the sole judges of the facts of this case. It is for you to determine what those facts are from what you have seen and heard in this courtroom. It is for you to determine where the truth lies. And we all know that in this case we have much conflicting evidence.

In this connection, it is for you to deter-

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mine also the credibility of the witnesses who testified here in court. And it is for you to determine what weight is to be given to their testimony. Again you have to determine where the truth lies.

So you see that in addition to being the sole judges of the facts of the case you, as jurors, are also the sole judges of the credibility of the witnesses and of the weight that is to be given to their testimony.

I will have more to say about these exclusive functions of yours later in my charge.

Insofar as the law of this case is concerned, I repeat you are dutybound to take the law as I give it to you, and apply the law so given to the facts of the case as you find them. You are not to concern yourself with the wisdom of any rule of law I may give you. Regardless of any opinion you might have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict in this case upon a view of the law other than that given to you by me.

In addition to what I have just stated, there are certain principles of law you must keep in mind and apply in your deliberations in this

[4664]

case.

During the course of this trial you have heard counsel make objections to some of the questions that were put to the witnesses. Objections were also made to some of the exhibits that were offered in evidence. You have seen counsel confer with the Court at side bar. And, of course, what was said there was out of your hearing. You have been excused from the courtroom so that the Court could hear arguments on points of law involved in the case. All these matters, lady and gentlemen, pertain solely to legal phases of the case and do not at all concern your function as jurors.

You are, therefore, not to speculate concerning such matters in your deliberations.

Getting back to your role as the sole and exclusive judges of the facts of this case, please remember and keep in mind, I repeat, that it is your recollection of the facts, and yours alone, that controls. Any comments concerning the facts of this case, whether made by counsel, or by the Court, are not binding on you. They are to be disregarded unless, of course, such comments happen to coincide with your own

[4665]

independent recollection of the particular fact or facts commented upon. Your verdict must be predicated solely upon the evidence as you, and you alone, recall and evaluate it.

You have heard statements made by counsel during the trial. Some of these remarks were made spontaneously in the fervor of a trial. You are not to consider these at all in your deliberations nor are you to draw any inferences for or against the plaintiffs or the defendant because of these remarks.

And in your consideration of the evidence in this case you are not limited to the bald statements made by the witnesses. On the contrary, you are permitted to draw from the facts you find to have been proved such reasonable inferences as seem justified in the light of common sense and your own experience.

An inference is a logical deduction from a proven fact.

Now let us turn to your role as the sole judges of the creditability of the witnesses who testified here. As I had said, it is your function and yours alone, to determine the credibility of the witnesses and of the weight that is to be

[4666]

given to their testimony.

In weighing the testimony of each witness you should consider such witness' relationship to the plaintiffs or to

the defendant. You should consider the witness' interest, if any, in the outcome of the case.

You should consider the witness' manner of testifying and his candor, fairness and intelligence.

And you should also consider the extent to which, if at all, the testimony of any particular witness has been corroborated or contradicted by other credible evidence in the case.

If you believe that a witness has wilfully sworn falsely to a material fact in the case, you may disregard the testimony of such witness, in whole or in part, except insofar as it may have been corroborated by other evidence in the case which has been found by you to be credible.

I repeat, the weight of the evidence is not necessarily determined by the number of witnesses testifying on either side. You are expected to use your own good common sense in your consideration of all the facts and circumstances in evidence to determine which of the witnesses are worthy of

[4667]

greater credence.

The purpose of the antitrust laws is to preserve the free flow of commerce and trade among the states, and to secure to everyone an equal right and opportunity to engage in the trade and commerce of the country.

Interstate commerce, as used in the anti-trust laws, means intercourse for purposes of trade in any or all of its forms within the flow of commerce across state lines or, if not within the flow of commerce across state lines, substantially affects such commerce.

For the purpose of this charge, "interstate commerce" and "trade or commerce among the several states" mean the same thing.

In the determination of whether or not interstate commerce is involved or is substantially affected, the exact location of state lines makes no difference, for if the forbidden effects under the antitrust laws flow across state lines to the injury or hindrance of interstate commerce, that commerce is involved.

I also charge you that the term "monopolize," as used in the antitrust laws, refers to the power allegedly obtained and maintained by the defendant

[4668]

for the purpose of removing or excluding competitors from the field of competition in a particular business or industry, in this case, the operation of bowling centers.

In this case the defendant has monopolized within the meaning of the antitrust laws if:

One, it has knowingly obtained or maintained monopoly power to remove or to exclude or keep out competitors from the field of competition.

Two, that the defendant possesses that power.

Three, that it has the purpose and intent to exercise that power to exclude or remove as to cause injury to the business of one or more of the plaintiffs.

Of course, if the power to remove or exclude competitors has been exercised and if, as a result of the exercise of such power, one or more competitors have been removed or excluded, monopolization has clearly occurred; but it is not necessary that competitors actually be removed or excluded from the field of competition if it appears from a preponderance of the evidence in the case that the three essential facts or conditions just stated have in fact occurred.

[4669]

The term "attempt to monpolize" involves two essential elements:

One, a specific or purposeful intent to monopolize.

Two, some act done in furtherance of that intent, but insufficient to produce a monopoly.

In order to find an attempt to monopolize, both elements—the intent and the act—must appear, and must together result in a reasonable probability that a monopoly will sooner or later occur.

I further instruct you intent is the purpose or aim or state of mind with which one acts or fails to act. A person is usually held to intend to do or fail to do everything such person knowingly does in fact do or fail to do.

It is reasonable to infer also that a person ordinarily intends all the natural and probably consequences of acts knowingly done or knowingly omitted.

So unless the contrary appears from the evidence, the jury may draw the inference and find that a person intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to

[4670]

result from any act knowingly done or knowingly omitted by such person.

An act or failure to act is done knowingly, if done voluntarily and purposely, and not because of mistake or inadvertence or other innocent reason.

[4671]

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case.

One is direct evidence—such as the testimony of an eyewitness. The other is indirect or circumstantial evidence—the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. As a gen-

eral rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Intent may be proved by indirect evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a person does or fails to do, there can be no eye-witness account of the state of mind with which the acts were done or omitted. What a person does or fails to do may indicate either intent or lack of intent.

In determining any issue involving intent, the jury should examine all the facts and circumstances in evidence which tend to shed light on state of mind.

[4672]

Here there may be an attempt to monopolize, without the offender actually having monopoly power.

But an essential element of an attempt to monopolize is a specific intent to destroy competition or build monopoly. Neither rough competition nor unethical business conduct by themselves is sufficient to show such intent. The intent must be both present and predominant and it must be an intent to gain control over some relevant market sufficient to set prices in that market or to exclude competitors therefrom.

It is not necessary to prove defendant's ability to achieve monopoly. You must find specific and a reasonable probability that monopolization will result from the attempt if you are to find that there has been an attempt to monopolize within the meaning of Section 2 of the Sherman Act.

By specific intent, I mean that the defendants must have done certain things with monopoly as their ob-

jective, which, if successfully performed, could result in actual monopolization.

Or, to put it a simpler way, the specific intent I am here referring to in connection with the alleged attempt to monopolize means that the

[4673]

parties did the acts charged intending to attain a monopoly. If you are convinced that the acts were done innocently and without the thought of obtaining or maintaining a monopoly, then there would be no specific intent of the type necessary to find defendants guilty of an attempt to monopolize.

Conversely, if you are convinced that the acts were not done innocently but were done with the thought of obtaining or maintaining a monopoly, then you may find that this "specific intent" was present.

I repeat, intent as used in this charge means a state of mind, and is determined not so much by what one says as by what one does. It is a fact to be proved like any other fact, by acts, conduct and circumstances.

It is not necessary that each specific act be shown to have been committed with the intent to eliminate competition or to enlarge or maintain a monopoly, as in the case of the specific intent required in the attempt to monopolize, but you may look to all of the acts committed within the period claimed and determine whether overall there was a general intent to maintain a monopoly position or

[4674]

to eliminate or forestall competition, and consider that overall picture together with the pattern or design of intent shown by acts and from all of those facts determine the specific intent.

The laws invoked by plaintiff forbid monopolization or attempts at monopolization of any part of trade or commerce among the States.

By the phrase, "any part of trade or commerce" it is meant an appreciable part of interstate commerce. Appreciable is a quantitative test which may be measured in dollar volume as well as industry percentage. You must find involved in order to find a violation of the Sherman Act, that there was interstate commerce since the Sherman Act may only be applied to activities which restrain or affect interstate commerce.

The acts complained of, to involve interstate commerce, may effect a business engaged in interstate commerce or may affect a business operating in intrastate commerce if interstate channels of commerce are used.

Thus, if the parties are involved in the flow of interstate commerce—the movement of goods and services across state lines—or if it affects such commerce significantly, then the Sherman Act

[4675]

applies.

If you find that the conduct here alleged operated directly upon goods in the flow of interstate commerce or that the acts complained occurred wholly on a state or local level, in intrastate commerce, but substantially affected interstate commerce, then interstate commerce exists for the purposes of the Sherman Act.

I repeat, monopolization means the possession of monopoly power by a party or parties through which power it is possible to exclude actual or potential competitors from any part of the trade or commerce among the several states, provided that the party has the intent or purpose to exercise that power. However, the power need not actually be exercised.

Indeed, where there is monopoly power, the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident constitutes monopoly. United States v. Grinnell, 384 U. S. 563 (1966).

In order to sustain the allegations of attempt to monopolize or monopolization, charged in the Complaint, it is not necessary that each

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and every act alleged be sustained or proven. It is sufficient if it is shown by a preponderance of the evidence that the defendants have engaged in conduct violative of the law as given to you.

Size alone is not a violation of the anti-trust laws and it is not conclusive evidence of monopolistic power or position, but is an element when compared with the size of its competitors which may be taken into consideration by the jury in determining the existence of monopoly power.

Now, monopoly power exists where a person possesses the power to foreclose competition or to secure for itself a competitive advantage when it desires to do so. It is not necessary that competition be actually excluded, but it is sufficient that such person or persons possess power to exclude actual or potential competition.

[4677]

The defendant is also charged with a violation of Section 7 of the Clayton Act by reason of the defendant's acquisition of bowling centers in three local areas in which monopolization is also charged. I recall Pueblo, Paramus and Holiday (Poughkeepsie). This is known as the acquisition charge.

I now turn to the charge of acquisition made by the plaintiffs against the defendant, which is known as Section 7 of the Clayton Act, to which I have referred heretofore.

As you know, this is a civil action for the recovery of money damages. In order to recover such damages on the acquisition phase of the case, the plaintiffs must, under the applicable law, prove four elements:

One, that the defendant violated Section 7 of the Clayton Act;

Two, that the plaintiffs have been injured in their business or property;

Three, that the antitrust violation was the direct and proximate cause of the injury to their business or property;

And four, that they or any one of them has been damaged in an amount which is reasonably

[4678]

ascertainable in dollars and cents.

As I previously instructed you, Section 7 of the Clayton Act provides that no corporation engaged in commerce shall acquire the whole or any part of the assets of another corporation also engaged in commerce where in any "line of commerce" in any "section of the country" the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly.

There are three elements involved in determining whether defendant violated Section 7 of the Clayton Act:

One, determination of the relevant line or lines of commerce—the product market. The term "product market" includes a service market as well as a product market in which the parties compete;

Two, determination of the relevant section of the country, the geographic market;

And three, determination of the likely anticompetitive effects of the acquisition of bowling centers in the relevant local market.

Section 7 of the Clayton Act is directed toward the preservation of competition and compe-

[4679]

tition can be measured only within the confines of an economically meaningful market.

In this case, you are concerned with the local markets of Pueblo, Colorado; Poughkeepsie, New York; Paramus, New Jersey, as far as the alleged violations of Section 7 of the Clayton Act are concerned.

You must decide whether the effect of the acquisition of bowling centers by Brunswick may be substantially to lessen competition or tend to create a monopoly in that "line of commerce" and "section of the country."

The determination of this question will establish whether or not this acquisition was a violation of Section 7 of the Clayton Act.

This determination must be made in light of several factors: the primary index of legality is the market share of the acquired and acquiring companies and the extent of concentration in the industry.

An acquisition which produces a firm controlling an undue percentage of the relevant market and resulting in a significant increase in concentration is presumptively unlawful, unless the defendants can overcome this presumption by

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other evidence to establish the vigor of competition or affirmative justifications in support of the acquisition.

While market shares are not determinative of legality of an acquisition, I instruct you that high market shares and significant increases in concentration may be sufficient in itself to establish a violation of Section 7. Section 7 of the Clayton Act may be violated either by showing a reasonable probability of a substantial lessening of com-

petition in the future or by showing a substantial lessening of competition which has already occurred.

It is a plaintiff's burden to establish that whatever injury they claim to have suffered is the direct and proximate result of such violation of law, if any, which you may find—namely, that they were injured by the actual or by the probable lessening of competition.

You are further instructed that the mere acquisition by one corporation of the assets of another, even though it results in some lessening of competition, is not forbidden; the Clayton Act prohibits only such acquisitions as in reasonable likelihood will result in a substantial lessening

[4681]

of competition in the relevant market.

If you find that the acquisition in question violated Section 7 of the Clayton Act, you must next determine whether plaintiffs have met their burden of proof in establishing by a preponderance of evidence that they have suffered actual economic injury.

Under the law, there is a clear distinction between the measure of proof necessary to establish the fact that the plaintiff has sustained some damage and the measure of proof necessary to enable you to fix the amount of the damage. The fact of injury must first be established before you can estimate the amount of damage.

The burden on plaintiff in proving the fact of injury is more stringent than that in proving the amount of damage. The fact of injury caused by the violation must be established by plaintiff with reasonable probability.

If you find that defendant violated Section 7 of the Clayton Act and that plaintiff was injured in his business or property, you must next determine whether the antitrust violation was the direct and proximate cause of the injury to plaintiffs' business or property.

[4682]

If the damage was merely incidental or consequential, or if the defendant Brunswick's antitrust acts are so removed from the claimed injury as to be only remotely causative, then plaintiff has not been injured by reason or anything forbidden in the antitrust laws.

In other words, it is not sufficient that plaintiff may have sustained some injury; he must show that the injury was caused by defendant Brunswick's unlawful acquisition and would not have occurred but for the acquisition.

I further instruct you that acquisitions normally violative of Section 7 of the Clayton Act are allowable when the company taken over is a "failing company." Such a company is one, which the evidence shows, "is in such straits that the termination of the enterprise and the dispersal of its assets seems inevitable unless a rival proprietor shall acquire and continue the business."

If it is found by you, the jury, that the acquired corporation's resources are so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders

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and injury to the communities where it was located, then it is a failing company.

However, it is for the jury to determine whether defendant's acquisitions were "failing companies" as defined above.

Likewise, the jury must also find, if the defense is to apply, that the acquiring company is the only available purchaser. If another group or person would or could have purchased the company and was pre-empted, then the defense must fail.

Thus in order to invoke the "failing company" defense it must be shown that (a) the acquired company was failing, and that (b) there were no other available purchasers.

The burden of proving that the conditions of the failing company doctrine have been satisfied is on those who seek refuge under it, in this case Brunswick.

Before proceeding any further, let me review summarily the plaintiffs' and defendant's cases. I will refer to the various witnesses' or some of their testimony in capsule form.

I again caution you that you, and you alone, are judges of the facts and you are not bound by my recollection of the testimony. It is your

[4684]

recollection of the testimony and yours alone that controls. Nor is it my intention, and I so caution you, that I do not emphasize directly or indirectly any witness' testimony.

The first witness for the plaintiffs was Daniel Parke Lieblich, president of Treadway, successor to National Bowl-O-Mat, a former plaintiff in this action. For the sake of brevity, I will refer to these various bowling centers by the name of the locality in which they are located and/or center name.

He testified that Treadway was the parent company of Pueblo, Paramus, Holiday (Poughkeepsie) and Paradise (San Juan), and that the parent company operated bowling centers in Indiana, Michigan, Minnesota and Iowa. They also once owned a center in Fort Lauderdale, Florida, but lost it.

He then testified as to the opening of the center in Pueblo, Colorado, by Treadway's predecessor National Bowl-O-Mat, and the experiences his company had there.

He then stated what the bowling center business consisted of: charging a fee for the use of the lanes, rental

being based on the number of lines bowled; the rental of bowling shoes and

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balls; a snack bar; a pro shop for the sale of bowling supplies; operation of a cocktail lounge and what has been described as vending and miscellaneous machines.

He then told about where a bowling center may derive its customers, by travel time. He also discussed the promotion and formation of leagues for men, women and children.

He also stated how the defendant Brunswick acquired and presently operates Belmont Lanes in Pueblo which competes for customers with Pueblo Bowl-O-Mat.

He testified that Brunswick is the largest manufacturer of bowling supplies in the world and manufactures 50 per cent of the automatic pinsetters sold in the United States and a competitor of Brunswick manufactures almost 50 per cent of automatic pinsetters produced in the United States, namely, American Machine & Foundry.

Brunswick also engages in the business of financing the equipment of bowling centers, including the purchase of pinsetters and lanes in interstate commerce and Puerto Rico.

In his testimony he stated that the following acts have been committed by Brunswick, that it,

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Brunswick, has achieved, maintains and exercises power to fix and control prices charged for the use of bowling lanes in each of the markets of parts of commerce at or near the various centers, namely, Pueblo, Paramus, Holiday (Wappingers Falls) and Fort Lauderdale, and has achieved and maintains and exercises the power and ability to exclude

competitors from said markets or parts of commerce in unlawful monopolization of said market.

I recall National Bowl-O-Mat lost Fort Lauderdale.

Mr. Lieblich testified that Brunswick discriminated against the Bowl-O-Mat plaintiffs by:

A, granting forbearance of debt to centers indebted to Brunswick and not to plaintiffs or some of them.

B, by the granting of favorable credit terms to plaintiffs' competitors causing plaintiffs to default in their obligation, so that Brunswick could take over the bowling center of plaintiffs, thereby monopolizing the market.

C, Brunswick charges low rentals and offers inducements to bowlers in their center with the purpose of weakening and excluding competition in

[4687]

the markets in which Brunswick operates bowling centers.

D, Brunswick was in a better financial condition to absorb losses in its centers and does not have to close these centers.

E, Brunswick owns the A-2 pinsetters and uses them in its centers, and their competitors cannot afford to do this.

F, Brunswick enjoys commercial advantages to the detriment of these plaintiffs.

G, the witness also stated that the defendant has attempted to monopolize market parts of commerce in various sections of the country.

He then testified as to the acts and/or omissions committed by Brunswick in Paramus Bowl-O-Mat, Paramus, New Jersey; Holiday Bowl-O-Mat, Wappingers Falls, New

York; Paradise Bowl-O-Mat, Puerto Rico; Pueblo Bowl-O-Mat; and what took place in Fort Lauderdale.

He used charts and summaries to testify as to what he considered the losses suffered by these four Bowl-O-Mats.

He also stated that the parent company, Treadway, lost approximately $41,000 in interest because of refinancing it incurred at the demand

[4688]

of the defendant to the detriment of Indianapolis Bowl-O-Mat.

I recall the parent company had to enter into an additional guarantee also.

He also testified as to the interest losses suffered by Treadway when it had to refinance to pay off its indebtedness to Brunswick.

The next witness for the plaintiffs was Senor Gonzalez of Puerto Rico, manager of Paradise Bowl-O-Mat for two years.

He related the bowling center conditions in Puerto Rico, particularly as far as Star Lanes was concerned. Star was financed by Brunswick and Star competed unfairly with Paradise. If Star had shut down, Paradise's business would have risen about $90,000, he said.

The Court then permitted the reading of Christie Vitolo's testimony. I recall he sold a center to Bruno that he bought at a bankruptcy sale of AIBC's equipment.

The next witness for the plaintiffs was William Kenney, manager for Treadway. He supervised several centers in the midwest.

He testified about the events in Pueblo and what happened to Pueblo when Belmont Lanes opened,

[4689]

equipped and financed by Brunswick, and how Pueblo lost money when Belmont opened and while it was operating. If Belmont had closed in 1965, he stated, Pueblo Bowl-O-Mat would have benefitted up to $90,000.

On cross-examination he admitted that Pueblo enjoyed a competitive advantage over some centers because of its appearance; it had a late liquor permit; a bus to transport school children to the lanes; a large meeting room, and a nursery which the other centers did not have.

He then stated again, if Belmont had closed in 1965 instead of Brunswick taking it over, 65 to 70 per cent of the bowlers would have come to Pueblo Bowl-O-Mat based on his experience. In 1969, he stated that in his opinion, Belmont did not have the power to exclude bowling centers and that there is nothing wrong for bowlers to leave Pueblo, go to Belmont, and return to Pueblo. This is competitively acceptable.

If Belmont had closed in 1967, he opined, Pueblo would have received about $80,000 of this Belmont business, applying a 70 per cent factor—20 per cent to Bolero, a small per cent lost and the balance would go to Park and Payne lanes.

[4690]

On redirect examination, he stated if a regular competitor came in, he would not have the resources of Brunswick. Brunswick also had the power to fix prices.

The next witness for the plaintiffs was Milton Mendelson, now the manager of Paramus Bowl-O-Mat, Paramus, New Jersey. He spent practically all of his adult life in the bowling business, as an entrepreneur, an employee of Brunswick and of National Bowl-O-Mat. He recited the history of the bowling center business for the past 20 years.

He then narrated his experiences with National Bowl-O-Mat as far as Holiday Bowl-O-Mat was concerned, and the effect of Brunswick taking over Dutchess Lanes for a period of time; the effect that Brunswick's taking over or opening centers in Lodi, Ramsey and Fairlawn had on Paramus Bowl-O-Mat; the effect of Brunswick operating Star Lanes in Puerto Rico had on Paradise Bowl-O-Mat—placing Paradise on a cash basis—and the effect Belmont Lanes, Brunswick, had on Pueblo Bowl-O-Mat.

He stated that the manufacturing costs of a pinsetter in 1962 was approximately $2200.

[4691]

On cross-examination he stated that he did not know what manufacturing costs included on the part of Brunswick. He did not know of any league, team or bowlers that Treadway lost nor of trips being offered to Europe by Ten Pins Center or Fair Lawn Center, competitors of Paramus.

Three years ago he testified that Holiday (Wappingers Falls) would benefit to the tune of $30,000 to $35,000 a year if Brunswick had closed Dutchess Lanes in 1969.

He now states that that estimate was conservative. He now testifies that Holiday would benefit to the tune of $100,000 to $120,000.

If Ten Pins Center, Brunswick, closed, Paramus would get 75 to 80 per cent of the business.

If Lodi Center, Brunswick, closed, Paramus would get 35 to 40 per cent of the business.

If Fair Lawn closed, Paramus would get 75 per cent of the business.

If Interstate, Brunswick, closed, Paramus would get 40 per cent of the business.

Then on redirect examination he stated that when he estimated the manufacturing costs at $2200 for a pinsetter, he was not testifying as

[4692]

an accountant.

In his opinion, Bowl-Your-Way-to-Europe, a promotion of Brunswick, was a competitive advantage for Brunswick.

On recross-examination, it was developed that one man and one woman won a trip to Europe from a Ten Pins Center tournament in a year.

Plaintiffs then read the testimony of Benjamin E. Bensinger, Chairman of the Board of Brunswick Corporation, and also a portion of his depositions.

The next witness for the plaintiff was Rex Martin Golobic, president of the Bowling Proprietors Association of America and owner, as I recall, of three bowling centers in the San Francisco area.

He testified to a resolution being passed in San Juan, Puerto Rico, in which the bowling operators expressed grave concern over the incursion of Brunswick Corporation into the bowling center operation and are still concerned. He then stated that Brunswick had not hurt him yet in his bowling center operations, but he is concerned about the future.

The deposition of Mr. Hanigan was read. He was president and chief executive officer of

[4693]

Brunswick Corporation at that time.

The plaintiffs then read portions of depositions of James Hanigan, president and Chairman of the Board of Brunswick.

The next witness for the plaintiff was Reuben Dankoff, president of General Bowling Corporation, who has been in the bowling center business since 1955.

I recall he testified that he was interested in purchasing a center known as Moffitt Lanes in Brooklyn; which center was indebted to Brunswick, being behind two months in payments, and there was also a provision between the original parties that Brunswick had to approve any sale and transfer.

He stated that he met with Mr. Frecker, an officer of Brunswick, and that he wanted to assume the outstanding obligations of Moffitt Lanes.

Frecker said that Brunswick had new guidelines and there would have to be a larger down payment to close this transaction. The witness offered to buy Moffitt stock but Moffitt declined.

He then learned that Brunswick bought Moffitt and one and one-half years later closed it.

In November 1964 the witness' company tried to buy Royal Lanes in West Hempstead, Long Island,

[4694]

a Brunswick lane, and also Elmont Bowling Center. This had Brunswick pinsetters but was not a Brunswick lane. Mr. Frecker of Brunswick said Brunswick was not interested in Elmont as an operator and as to Royal Lanes, he stated that Brunswick would operate it as part of a chain. Brunswick did not acquire Royal Lanes for one year and he, the witness, decided to purchase Elmont.

He then stated that he met Mr. Frecker in Puerto Rico at a convention and discussed the purchase of Roosevelt Lanes. He stated that he had an appointment to purchase the same, subject to Brunswick's approval.

Mr. Frecker said that Roosevelt was a bad center, should not have been opened, that Brunswick had many commitments with other customers in the area, that we, Brunswick, would close it.

Shortly after, Brunswick took over Roosevelt and another lane in another center, Americana, owned by Roosevelt. Brunswick operated Roosevelt until 1969 at a loss and is still operating Americana.

He then stated that he tried to purchase Sunset Lanes in Deer Park, Long Island, after Brunswick purchased it from Mr. Vitolo. He spoke

[4695]

with Mr. Rudo of Brunswick and also was told that none of AIBC centers could be purchased.

He then testified as to his experiences in Long Island between his center, Viking Lanes, and Sunset Lanes, Brunswick. He stated that his center could not meet the inducements offered by Sunset Lanes which was owned and operated by Brunswick.

He stated that Brunswick operated a River Bowl center in Maryland and that the manager tried to lure away two of his managers in Virginia, which necessitated his giving more money to his managers.

He then discussed circulars sent out to secretaries of bowling leagues requesting that they try to convince bowling center operators to purchase A-2 pinsetters, which Brunswick had just put on the market.

I recall that he testified that his centers could not compete with Brunswick, not only because of inducements Brunswick centers offered, but because of Brunswick's reducing its prices for bowling. "If I did," he stated, "we could not make a fair margin of profit."

He then discussed a resolution passed in Puerto Rico in 1965.

[4696]

I recall he then testified as to his experiences in operating other bowling centers in Long Island.

Plaintiffs then completed the reading of Mr. Hanigan's testimony and also that of Mr. Milton Rudo, both officers of the defendant company.

The last witness for the plaintiff was Mr. Richard A. Davis, who has been in the bowling center business for many years, presently employed by Treadway, parent company of bowling centers owned by it.

I recall he related his experiences with regard to a center in Freeport, Long Island; West Boyleston, Massachusetts; Brooklyn, New York; Framingham, Massachusetts; and Astoria, Long Island.

He then testified as to his experiences in operating the West Malton Lanes in West Boyleston, Massachusetts in competition with Lincoln Lanes, a Brunswick center.

He also stated that he had visited three bowling centers in New Jersey, which contained AMF equipment which Brunswick owned and operated.

I recall he then testified as to how he and Mr. Lieblich prepared P-53 in evidence, which

[4697]

sets forth the damages allegedly suffered by four of plaintiffs' centers based on acts of this defendant.

On cross-examination, he admitted that Treadway was enjoying an upswinging business and that the long-term debt for equipment had been paid off, that the bowling business operation had generated a good cash flow, net worth is over five million dollars. He complained primarily about price cutting.

Mr. Seeley read Mr. Hanigan's speech delivered in San Juan, Puerto Rico, setting forth Brunswick's 14 points.

The first witness for the defendant was John A. Barron, a career man with the Brunswick Corporation, presently assistant comptroller, who was familiar with all of the company's records.

He testified about the figures and graphs contained in defendant's exhibits relating to pinsetters and lanes repossessed. He then described the figures contained in a number of exhibits which you will have with you in the jury room.

He also discussed the operation of BCO, an operating division of Brunswick, and its relation

[4698]

to Brunswick.

He then testified as to proposed allocation of principal and interest to bowling center operations, but admitted this chart was prepared for this litigation, and that it was Brunswick's policy not to assign interest to bowling centers for administrative purposes.

In 1972 there were 8,818 centers in the United States and BCO operated 168 of them. In 1961 Brunswick had liens on 56,180 pinsetters. In 1972 Brunswick had liens on 9,852 pinsetters.

On cross-examination he admitted no centers were sold in 1965, but a few had been sold in the last few years and that the proceeds of sale, lease or deactivations of centers were not included in the charts.

The next witness for the defendant was Milton Rudo, an officer of the company. He stated that when the repossession started in 1964, an evaluation team was sent to the centers to see whether they could be viable.

There was a single price for pinsetters and lanes and finance charges were the same for all customers.

In 1965 Brunswick took over 124 centers,

[4699]

3000-plus lanes, 3600 pinsetters went into warehouses and he received the 14 points from their counsel. A training program was instituted.

He admitted the operation of numerous centers by Brunswick company, some of which had AMF equipment; Brunswick company also had management contracts.

Their advertising expenses cost about 3 per cent, including trophies, Bowl-Your-Way-to-Europe and youth programs. Brunswick company charges the same lineage as the area charges. They have never lowered prices; they honor league contracts, they have adhered to the freeze prices. Ten Pins on the Mall, Fair Lawn, Lodi, Interstate have not lowered prices nor did Belmont or Dutchess when it was in operation.

He then testified as to his negotiations with Mr. Dankoff about Moffitt Lanes in Brooklyn.

In 1970 Brunswick company operated 169 centers and in the United States there are about 9500 centers. Since 1966 nine centers have been sold and two have been leased by Brunswick company. All are still for sale, if the price is right. Since Brunswick company has taken over the centers, it has had a $22 million cash

[4700]

flow. Since 1969, Brunswick company has opened seven new centers with an investment of about $6 million. All used pinsetters, some used lanes. They plan to build four or five centers a year.

Many centers compete with Brunswick company throughout the country and he stated that Brunswick sells them equipment. He then testified as to how Brunswick company acquired Belmont contrary to Mr. Lieblich's advice in 1965 from the former owner. Brunswick company did not want to injure Pueblo Bowl-O-Mat when they took over Belmont, he said.

He then testified as to what happened in the Fort Lauderdale area with Imperial-Dolphin and Fort Lauderdale Bowl-O-Mat.

In his opinion competition is a minor problem; keep the centers clean, good promotion, work at it.

He then related what happened in Poughkeepsie with Dutchess Lanes, finally sold by BCO.

He stated Interstate and Fair Lawn have been profitable, both are for sale. He stated that this center was offered to Mr. Lieblich but he ignored it.

Brunswick company's selling price formula was, take the cash flow and revenue, project it for ten years, increase by 3 per cent, discount

[4701]

the money times 5.9, gives you the selling price.

He also described the negotiations with Mr. Lieblich in 1964, when Treadway's loans were renegotiated and a parent guarantee was insisted upon, with add-on interest, by Brunswick. He said Great Lakes Bowling Center received the same guarantee.

Finally, he stated that Brunswick company operates centers to make them a viable business so they can be sold. Brunswick company doesn't charge lower prices. Their rentals are competitive, he says. Brunswick company does not want to weaken or exclude competition.

On cross-examination he admitted that Brunswick company has 60 salesmen, but they have only sold nine centers in the 60-lane class, none in the 40-lane class.

He then testified about the lease-management contract with Rahway Recreation Center. I recall, he then testified that Brunswick is not interested in purchasing any bowling centers and that the Rahway option to purchase was a mistake. On April 12, 1973, three years after contract was signed, Rahway's option to purchase was cancelled he says, because the lawyer made a mistake.

[4702]

He admitted that several centers managed by Brunswick Company do not receive management fees. After rent is paid, Brunswick company receives the profits.

He stated that before Brunswick opens a center, they consider their relationship with customers, although leases have been entered into, without contacting some other party to see if they were interested.

Before Belmont was acquired they relied on legal advice because of the antitrust laws. In California, the legal department advised against acquiring a center because of recent acquisition in the area. We are advised that 25 per cent of a market was not a monopoly, he stated. In Belmont, the owner failed and we had to repossess.

The next witness for the defendant was Frank Esposito who owns Paramus Bowling Center, with AMF equipment in it. He testified that he would sooner compete with Brunswick than any other competitor. He stated that fair competition keeps people bowling, advertising would be competitive. Brunswick, he says, meets that competition.

On cross-examination he testified as to how

[4703]

he operates his center so successfully: clean, nursery for children, promotion of leagues, prizes.

The next witness for the defendant was Bernard Rudo, brother of Milton Rudo, vice president in charge of operations.

He testified as to conditions in Broward County, Florida—Lauderdale and surrounding area,—and also in Bergen County, New Jersey—mileage and also size of centers.

He was formerly president of A. I. B. Company which went into bankruptcy and he took over 26 of these centers

in the country for Brunswick. He joined BCOD in March 1965. All AIBC Company prices were maintained or raised, never lowered.

He then testified about promotional activities conducted by BCOD, particularly with reference to Sunset Lanes' activities and Airborne's leagues on Long Island.

I recall he said he was confused about certain testimony he gave one day, but then upon reflection he did remember the contracts between Sunset Lanes and Airborne Industries Laboratories.

On cross-examination, he testified about a voting trust agreement that AIBC company had entered

[4704]

into; Brunswick being a party thereto. Before bankruptcy Brunswick was owed $10 million by AIBC company. 26 centers were involved.

He also admitted that when he discussed prices for Sunset, he did not consider free games offered by Brunswick Company, for example, breakfasts in a California center or free rental of bowling shoes.

He then stated where all AIBC company centers were located throughout the country and the population of the particular area, and outside of one community, Brunswick company owns 100 per cent of the market in Indiana.

The next witnesses for the defendant were:

Kenneth Brooks Abernathy, president, Brunswick corporation;

Ernest J. LaFroscia, a former employee of Airborne Instruments Laboratory;

Joseph A. Rice, corporate credit manager;

John Hanigan, Chairman of the Board of Brunswick.

The defendant also produced as rebuttal witnesses:

Mr. Kenney, who testified heretofore. He is the regional manager of the midwestern area for

[4705]

Treadway;

Mr. Davis, who testified heretofore. He is the Director of Bowling Operations for Treadway;

Mr. Lieblich, president of Treadway Companies, Inc., former witness in this case.

There is no necessity for this Court to repeat any of their testimony. You have heard it all within the past week and I am sure that your recollection of the testimony is as good, if not better, than this Court's.

[4706]

During the trial there were admitted in evidence certain exhibits which have been referred to as charts, graphs, maps, pamphlets, reports, schedules and/or summaries.

These exhibits are not in themselves independent proof. They purport to be only pictorial or graphic representations or resumes of information or data set forth in the testimony of a witness or in documents that are exhibits in evidence.

You may rely on charts and summaries introduced by the parties as showing the truth of the matter represented therein, giving them as much effect as is given to any other evidence.

These charts summarize data introduced into evidence and are designed to make the more complex underlying materials more easily understandable without changing them in any way.

If the information contained in the records or in the testimony is then converted into a visual or graphic form and the chart or summary or map or graph is marked as an exhibit, the chart or summary or map or graph does

not have any independent value as proof because it is only based upon the testimony or the records.

[4707]

It is a visual aid just to help you understand what is in the records and what is in the testimony so therefore you will understand that charts, graphs, summaries, schedules and maps are not by themselves independent evidence.

The Court has asked questions of some of the witnesses during the trial. This was strictly for the Court's benefit. The Court intended no emphasis on any testimony that it asked questions pertaining thereto.

You are not to draw any inferences for or against any of the parties because of the interrogation by the Court during this trial.

The Court has been presented with certain requests to charge by the plaintiffs and the defendant. Some I will grant. Some I will decline, either because they are in my regular charge or I do not deem them as being relevant to this cause of action.

The requests that I shall grant are to be considered by you, members of the jury, with this entire charge.

You are to draw no inferences for or against any of the parties because I have declined to grant certain requests.

[4708]

As to the plaintiffs, I will charge the rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions.

An exception to this rule relates to those whom we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state their opinions as to relevant

and material matter, in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves.

If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

During the trial of this case certain previous testimony has been read to you, by way of deposition or otherwise. The testimony of a witness who for some reason cannot be present to testify from the witness stand is usually presented

[4709]

in writing under oath. So, too, one party may rely upon the prior depositions of the other party.

Such testimony is entitled to the same consideration and, insofar as possible, is to be judged as to credibility and weighed by the jury in the same way as if the witness had been present.

It is therefore clear that it is the philosophy of trade in this country that businesses, both large and small, shall be conducted pursuant to certain basic rules of fairness.

It is that philosophy that business shall be competitive, that men may invest their money in legitimate activities, and that in business they will compete with each other as to quality of goods, as to prices, as to service and as to various other matters, but, again, according to rules of fairness—most importantly, the rule that the strong may not prey on the weak.

The antitrust laws also protect the public at large against the evils incident to the restriction of competition by striking down and outlawing monopolies or other aggregations of capital which tend unduly to interfere with the free exercise of the right of those engaged or desiring to engage in such trade or commerce.

[4710]

The antitrust laws protect against those who monopolize trade or commerce, those who attempt such a monopoly, or those who acquire other companies with the result that competition is substantially lessened or that a monopoly is created or tended to be created.

There are three essential aspects of the case which you must consider: First, whether there was a violation of the Sherman Act or Clayton Act or both acts;

Second, whether, if such a violation occurred, it was a proximate cause of damage to one or more of the plaintiffs;

And third, the amount of such damage.

An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that such act or failure to act played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of such act or failure to act.

An injury is proximately caused by an act or failure to act whenever it appears that the injury was either a natural or a reasonably

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probable consequence of such act or omission.

If you have found that there was a violation of the antitrust laws and that the violation caused plaintiffs injury, you will have to determine to what extent the consequences which befell the plaintiffs were attributable to the wrongdoing of the defendant.

This question of extent of injury deals with the amount of damages, and I shall return to that question later on in these instructions.

I repeat, plaintiffs' second claim which is before you in this case is based upon Section 2 of the Sherman Act.

There plaintiffs' position is that Brunswick has monopolized or attempted to monopolize the business of operating bowling centers by expanding from Brunswick's original business of manufacturing, selling and financing automatic pinsetters, lanes and other bowling equipment into the new business of operating the bowling centers themselves in competition with Brunwick's own customers, namely, independent bowling centers such as plaintiffs'.

It is plaintiffs' further position that Brunswick operated many of its bowling centers at a loss, including Brunswick centers which are direct competitors of plaintiffs' own centers.

[4712]

I am going now to begin talking to you about the words "monopolize" and "attempt to monopolize" which appear in Section 2 of the Sherman Act. And you will note, first, that the word "monopolize" is a verb and not a noun. That is, the statute is directed at one or several people who monopolize or attempt to monopolize. It is not directed in terms of a monopoly, and certainly is not directed at what laymen ordinarily talk about as a "monopoly." You may start with the notion that anybody who has 100% of the business is a monopoly. But that would be the wrong approach in connection with this statute. As here used, the verb "monopolize" means to acquire the

power in the marketplace to exclude actual or potential competition, and to follow such a course of conduct with the intent of monopolizing.

It would be a violation of the law, and it would be a prohibited monopolization, for a person or group of persons to seek to secure a dominant share of the market through a a restraint of trade which was prohibited, or through a predatory practice, or through the bad faith use of otherwise legitimate devices. It would be a prohibited monopolization, for example, if a person or group of persons used their power to foreclose on loans, not with the intent of forwarding

[4713]

their banking or credit or other legitimate business interests, but with the purpose of stifling actual or potential competition. That is to say, it would be unlawful for a person or group of persons to agree to take steps which were directed at excluding actual or potential competition with the intent of accomplishing that particular result, rather than with the intent of doing something innocent to further their general credit, banking or like policies.

Now, this word "monopolize," as used in Section 2 of the Sherman Act, has two elements: (1) the acquisition of monopoly power in a relevant market, and (2) the maintenance of that power, as distinguished from lawful internal growth or development of a superior product, business acumen or historic accident. Thus monopoly power may be found by you to exist if you find that Brunswick had the power to control prices or the power to exclude competition.

Monopoly power, whether lawfully or unlawfully acquired, may violate Section 2 of the Sherman Act though it remains unexercised, since the existence of power to exclude competition when it is desired to do so is in itself a violation of Section 2, provided it is coupled with the purpose or intent to exercise that power.

It is nonetheless wholly proper for you to

[4714]

consider any evidence which shows that Brunswick again and again and again exercised its monopoly power to exclude competition. Moreover, when a monopolist exercises its power to exclude competitors, it is not necessary to find a specific intent to monopolize, but rather . . . the defendant would be liable for the natural and probable consequences of his acts.

Where a defendant possesses the power to exclude competition or to secure for itself a competitive advantage when it desires to do so, it is deemed to possess monopoly power. It is not necessary that competition actually be excluded, but it is sufficient that such defendant possess power or ability to foreclose or exclude actual or potential competition if and when it decides on its own to do so. You may find that Brunswick intended the normal consequences of the business arrangements which it entered into. It is not necessary to find that Brunswick intended to injure plaintiffs or anyone else in order to find illegal monopolization. This is because "no monopolist monopolizes unconscious of what he is doing."

You will recall that I have read to you a law which states that a person or persons should neither monopolize nor attempt to monopolize. And the complaint which is before you uses both the verb

[4715]

"monopolize" and the longer phrase "attempt to monopolize." In order to show a violation of the law and thus allow recovery of damages, it is not necessary that the

plaintiff show you that there is an achieved or completed monopolization. It is sufficient for recovery that plaintiff shows an "attempt to monopolize."

Brunswick is charged with attempting to monopolize the business of operating bowling centers. An attempt to monopolize involves the employment of methods, means and practices which normally move towards monopolization, and which, although falling short of monopolization, create the reasonable probability that monopoly will be achieved. In order to find Brunswick liable for an attempt to monopolize you must find that Brunswick employed such means and that it had the purpose to achieve or build a monopoly. In order to be liable for an attempt to monopolize it is not necessary that the acts or practices of defendant shall actually result in monopolization.

"Attempt to monopolize" means to take steps toward acquiring a dominant position in the market, and to take such steps without special permission at law as in the case of a patent, where there is a public interest in protecting inventions, or in the case of a

[4716]

public utility—which is a lawful monopoly licensed by the government—where there is an overriding public interest in the providing of indispensable services as efficiently as possible. The intent required means only the intent to enter into business arrangements which can be expected to result in exclusion of others from the market. It is not necessary that the intent be to injure plaintiffs or anybody else.

In this case, you have the evidence of the defendant's acts, and its explanation of them. If you find that the defendant knowingly did acts of attempted monopolization which the law renders illegal, you must determine the intent of defendant in doing them, from the acts themselves

and their natural and foreseeable legitimate consequences and all other evidence before you.

You may find that Brunswick intended to acquire other companies and intended the business arrangements it entered into. The intent required means only the intent to enter into business arrangements which can be expected to result in exclusion of others from the market. It is not necessary to find that Brunswick intended to injure anyone in order to find illegal attempted monopolization.

[4717]

The intention needed to prove the wrong of attempted monopoly is merely the intention to do the acts which tend to create a monopoly. To find that Brunswick attempted to achieve an illegal monopoly, it is not necessary to find that Brunswick intended to injure anyone. You must ask yourself why Brunswick maintained numerous bowling centers for every year of operations at a loss. If you find that Brunswick maintained these numerous centers in order to have a dominant position in the operation of bowling centers at the time when the market improved, then you may find that Brunswick intended to attempt to monopolize the business of operating bowling centers either regionally or nationally.

Thus the evidence of Brunswick's losses each year on numerous bowling centers, including BCOD centers which are direct competitors of some of the plaintiff bowling centers, bears directly on the plaintiffs' charge of attempt to monopolize as well as their charge of monopolization. As concerns both charges, it is highly relevant to note that sales below cost made for purposes of eliminating a competitor or of forcing sales by a competitor or competitors at comparable prices frequently have been cited as traditional examples of violation of the Sherman

[4718]

If you find that Brunswick operated BCOD centers at a loss in one or more of the local markets, you may properly find a national monopoly. Because of its national operations, Brunswick was able in many areas to operate at a loss. Operations at a loss in one or more local markets prove that Brunswick enjoys national monopolistic power. Such operations at a loss would not be possible for any independent bowling center and permit Brunswick to extend Brunswick's national monopolistic control to each such market. Hardly any indicium of monopoly power is more persuasive than the continued capacity of a national business to sustain operations at a loss either in particular areas or in particular services or products.

[4719]

You may find that Treadway, and its subsidiary, Indianapolis Bowl-O-Mat, were forced to make banking arrangements because Brunswick, exercising its national monopoly power discriminatorily, demanded payment of the entire Treadway chain indebtedness and would only extend the term of that indebtedness on unfavorable credit terms unfavorable to and discriminatory against Treadway, and its subsidiary, Indianapolis Bowl-O-Mat.

You may properly consider, in your deliberations, whether or not Brunswick's "deep pocket" enabled it to enter the bowling center market which, the evidence shows, was previously occupied by relatively small companies and whether or not that ability opened the possibility and power to sell at prices approximating cost or below and thus to undercut and ravage the less affluent competition.

You will recall that when I read the statute I referred to the phrase "any part of the trade or commerce among the several states."

For the purposes of the statute and for the purposes of this Complaint in this case, any part of the trade or commerce means any identifiable

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segment of trade or industry which constitutes, as it were, a kind of separate market, to use a technical economic term.

You must direct your finding as to monopolization to the issue of whether or not Brunswick had the power to fix prices or exclude competition.

There is no support in the law for Brunswick's argument that its supposedly "insignificant" percentage participations in the national market and in the local markets in Pueblo, San Juan, Poughkeepsie, Paramus and Fort Lauderdale refute that it can act as a monopolist or attempt to achieve a monopoly in any of those markets.

If you find that Brunswick was able, by enforcing some credit obligations and forbearing on or forgiving others, to determine which independent bowling proprietors would survive and which would not, then you may find that Brunswick enjoyed the power to exclude competition and had an illegal monopoly or attempted to achieve one either regionally or nationally.

You should consider in this respect Brunswick's enforcement of some credit obligations and not others in the following areas: Pueblo, Colorado; Fort Lauderdale, Florida; and

[4721]

San Juan, Puerto Rico.

If you find that Brunswick, because of its combined role as a manufacturer of bowling equipment, the financier of its customers and an operator of bowling centers,

used this combined position to pick and choose among its bowling center customers as to which customer would be permitted to continue and which customer would be forced out of business, then you may find that Brunswick enjoyed an illegal monopoly in the national bowling center market.

If you find that Brunswick's dominant position in the bowling industry conferred upon its BCOD bowling centers monopoly advantages not enjoyed by competing independent proprietors, then you may find that Brunswick monopolized or attempted to monopolize the bowling center business.

You may conclude that such monopoly advantages exist from evidence showing that Brunswick's centers, unlike their independent competitors, paid no interest on its lanes and pinsetters and incurred depreciation charges which were approximately half of those incurred by independent proprietors.

You should also consider the evidence which

[4722]

shows that Brunswick's centers, unlike their independent competitors, could and did underwrite the costs of inducements for its BCOD centers such as free bowling, trips to Europe and giveaways such as turkeys, liquor or trophies; and the cost of installing new A-2 automatic pinsetters or converting A-1 pinsetters to A-2's.

If you find that it was Brunswick's intention to stay permanently in the business of operating bowling centers, then you may also conclude that Brunswick's statements that it was going into the bowling operating business merely for salvage were false or self-serving, or that Brunswick thereafter changed its mind.

If you find that Brunswick is presently building new bowling centers and operating one or more such centers

itself, such as in Omaha, Nebraska, that circumstance is inconsistent with Brunswick's professed objective merely to conduct salvage operations.

You must find whether Brunswick monopolized the local markets for bowling centers in Pueblo, Colorado; Poughkeepsie, New York; Paramus, New Jersey; San Juan, Puerto Rico; and Fort Lauderdale, Florida.

[4723]

You must also find whether Brunswick attempted to monopolize those five local markets plus the local market for bowling centers in Indianapolis, Indiana.

In considering each of these, if you find that in the particular local market, the same bowlers had a choice as to which center they would choose for bowling, you must find that such region constituted a local market. Whether you find that bowlers had a realistic, meaningful choice should depend on whether the centers in each such region were generally comparable and whether bowlers could travel to such centers without substantial difficulty in terms of time or distance.

There also can be no doubt that there are local geographic markets for the operation of bowling centers in metropolitan areas located in various parts of the country.

As to each of those local markets, the applicable law is that Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. The geographic markets selected must correspond to the realities of the Industry and

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economically significant.

Thus, the geographic market may encompass the entire nation, and it may also be as small as a single municipal or other area.

[4725]

If you find local markets in the regions I have just referred to, then you must consider whether Brunswick monopolized or attempted to monopolize such local markets. The evidence shows that plaintiffs owned and operated bowling centers in Paramus, New Jersey; Poughkeepsie, New York; Pueblo, Colorado; and San Juan, Puerto Rico; and that until December 1964 plaintiffs also maintained a bowling center in Fort Lauderdale, Florida. If you find that as a result of Brunswick's operation of bowling centers at a loss in competition with plaintiffs' centers, or as a result of Brunswick's providing special inducements in the form of reduced prices, prizes, and the installation of A-2 automatic pinsetters, that one or more of such bowling centers of plaintiffs has been excluded in whole or in part from the market, then you may find that Brunswick was using its monopoly power to exclude the competition of plaintiffs' bowling centers, and illegally to maintain a monopoly. Likewise, you may make a similar finding of use of monopoly power if you determine that Brunswick's extension of favorable credit terms to plaintiffs' competitors has, in whole or in part, excluded plaintiffs' centers from the market. Finally, you may find partial exclusion of any of plaintiffs' centers if it suffered any loss of revenue as a

[4726]

result of Brunswick's extension of discriminatory terms of credit.

In your deliberations as to whether or not Brunswick monopolized these five local markets or attempted to monopolize these five local markets plus Indianapolis, Indiana, you may take into consideration the fact that the evidence shows that its acquisitions in the market in

Pueblo, Colorado, in the market in the Poughkeepsie area, in the area of Paramus, New Jersey, (and in the Fort Lauderdale area,) gave Brunswick the power to fix prices or to exclude competition in those three local markets. You may consider whether or not Brunswick's decision not to enforce its equipment obligations against Star Bowl or its decision to raise the interest rates for plaintiffs' Indianapolis bowling center, was an exercise of Brunswick's power to fix prices or to exclude competition.

Plaintiffs' next claim, known as the third claim, charges Brunswick with violations of Section 7 of the Clayton Act.

[4727]

The Section 7 charge applies only to the local markets of Pueblo, Poughkeepsie and Paramus. I ask you, therefore, to direct your attention to those markets.

The undisputed evidence shows that Brunswick acquired Belmont Lanes in April 1965. As a matter of law this was an acquisition in a line of commerce, the operation of bowling centers, in a section of the country, namely, the Pueblo, Colorado, metropolitan area.

If Brunswick's acquisition of Belmont Lanes substantially lessened competition, then Brunswick violated Section 7 by acquiring Belmont Lanes. You may consider that Brunswick describes itself as "Number One in Bowling" and is the largest manufacturer of bowling supplies and equipment as well as being the banker for its bowling center customers. Although no precise figure exists to measure the extent of the market which must be occupied in order for competition substantially to be lessened by an acquisition, I charge you that any percentage of the market achieved by Brunswick in the Pueblo area beyond an insubstantial amount, say beyond 10 to 15%, may be sufficient

for you to conclude that competition has substantially been lessened. Consequently, you

[4728]

properly may conclude that Brunswick by the acquisition of Belmont Lanes violated Section 7 of the Clayton Act because Brunswick through that acquisition obtained allegedly more than 20% of the Pueblo, Colorado, bowling center market.

[4729]

The evidence shows that Brunswick acquired Dutchess Lanes in December 1965. I instruct you as a matter of law that this was an acquisition in a line of commerce, the operation of bowling centers, in a section of the country, namely, the Poughkeepsie, New York, metropolitan area.

If Brunswick's acquisition of Dutchess Lanes substantially lessened competition, then Brunswick violated Section 7 by acquiring Dutchess Lanes.

You may consider that Brunswick describes itself as "Number One in Bowling," and is the largest manufacturer of bowling supplies and equipment as well as being the banker for its bowling center customers.

Although no precise figure exists to measure the extent of the market which must be occupied in order for competition substantially to be lessened by an acquisition, I charge you that any percentage of the market achieved by Brunswick in the Poughkeepsie area beyond an insubstantial amount, say beyond 10 to 15 per cent, may be sufficient for you to infer that competition has substantially been lessened.

Consequently, you may properly conclude that

[4730]

Brunswick by the acquisition of Dutchess Lanes violated Section 7 of the Clayton Act because Brunswick through

that acquisition obtained more than 20 per cent of the Poughkeepsie, New York bowling center market.

The evidence shows that in the Paramus market Brunswick acquired Interstate Lanes in March 1965, Fair Lawn Lanes in March 1966, Ten Pin Lanes in 1968 and Lodi Lanes in 1970.

If Brunswick's acquisition of these four centers substantially lessened competition, then Brunswick violated Section 7 by acquiring them.

You may consider that Brunswick describes itself as "Number One in Bowling" and is the largest manufacturer of bowling supplies and equipment as well as being the banker for its bowling center customers.

Although no precise figure exists to measure the extent of the market which must be occupied in order for competition substantially to be lessened by an acquisition, I charge you that any percentage of the market achieved by Brunswick in the Paramus area beyond an insubstantial amount, say beyond 10 to 15 per cent, may be sufficient for you to infer that competition has substantially

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been lessened.

Consequently, you may properly conclude that Brunswick by the acquisition of Interstate, Fair Lawn, Ten Pin Lanes and Lodi Lanes violated Section 7 of the Clayton Act because Brunswick through those acquisitions obtained allegedly 39 per cent of the Paramus, New Jersey, bowling center market.

The undisputed evidence shows that Brunswick acquired Fort Lauderdale Bowl-O-Mat and Imperial Bowl of Dania, Florida, the spring of 1965. As a matter of law this was an acquisition in a line of commerce, the operation of bowling centers, in a section of the country, namely, the Fort Lauderdale metropolitan area.

There is no claim for violation of Section 7 as far as Fort Lauderdale Bowl-O-Mat is concerned.

A company is not a failing company merely because it is experiencing financial difficulties or temporary losses.

To qualify under the failing company doctrine, the resources of the acquired business must be so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure.

[4732]

The "failing company" defense, therefore is a very restricted one. The acquiring company must show that the acquired company faced the grave probability of business failure, and that it was the only available buyer.

And it must show that there was no prospect for reorganizing the company which was acquired.

If some of the centers which Brunswick acquired were not failing, and if operators other than Brunswick could and would have acquired the centers in question, the doctrine does not apply.

I instruct you as a matter of law that the approval of the American International Bowling Corporation bankruptcy sale in no way constituted approval of Brunswick's acquisition of the AIBC centers under the antitrust laws.

The problem of damages in an antitrust case is a difficult one. You cannot go to a book and look for the answer. The plaintiffs must satisfy you that the damage which they suffered was attributable to the wrongdoing of Brunswick. They have the burden of showing that the damage was the result of the misconduct of Brunswick in this case.

[4733]

If, under the instructions of the Court, you should find that the plaintiffs are entitled to a verdict, the law provides

that the plaintiffs are to be fairly compensated for all damages to their business or property, which was proximately caused by the defendant's conduct in violation of the antitrust laws. In arriving at the amount of the award, you should include all damages suffered by the plaintiffs because of lost profits; that is to say, profits which the plaintiffs would have made if Brunswick had not violated the antitrust laws.

In this case the plaintiffs are required to prove the essential elements of their claims and the burden of proof is on plaintiffs in the case to establish by a preponderance of the evidence:

(1) That the defendant has violated the Sherman or Clayton Acts in one or more particulars;

(2) That such violation by defendant was a proximate cause of some injury and consequent damage to the plaintiff "in his business or property."

Further, by the term "proximate cause" as used herein it is meant a cause which in a natural and continuous sequence, unbroken by any new and independent cause, produces an event and without which the event would not have occurred; and to be a proximate cause

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of an event, it should have been reasonably anticipated and foreseen by a person of ordinary care, and prudence, in the exercise of ordinary case, that the event or some similar event would occur as a natural and probable consequence. There may be more than one proximate cause of an event.

An injury or damage is proximately caused by an act or omission whenever it appears that the act or omission played a substantial part in actually bringing about or

causing the injury or damage, and it further appears that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

If you find that plaintiffs have in fact suffered such damage to their business or property, then the circumstances that the precise amount of damage may be difficult to ascertain should not affect the plaintiffs' right to recover damages. Although you can't render a verdict based on mere speculation or guesswork, the plaintiffs are allowed some sensible leeway in their method and proof of damage. In other words, long as there is evidence to support their theory or theories of damage and their computation; it won't matter if it were difficult or even practically impossible to calculate such

[4735]

damages to the last penny.

If, in fact, plaintiffs, have been deprived of business by violation of the antitrust laws, by that same token they may have been deprived of the ability to prove exactly what would have happened.

The violators, if any there be, may not take advantage of their own wrong by claiming that damages are too uncertain, if the evidence upon the question of damages reasonably permit approximation of damages based upon reason and the evidence received here in open court.

You should not look to any single element or any single fragment of evidence, but should weigh all of the evidence throwing light upon the extent of damages, if any.

The purposes of damages in an action of this kind, lady and gentlemen, to be fixed by a jury in an antitrust suit, if damages are proper and you should so find, is to put the plaintiffs back in as good a position as they would

have been in if there had not been any violation and if the resulting injury, if any, had not occurred.

So, if you fix damages, you should return them in such sum as you find were the actual damages without increase or diminution. If the fact of damages

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to the plaintiffs has been established by a preponderance of the evidence, then you may determine the amount of the damages on the basis of the best evidence available and may act upon probable and inferential proof, as well as direct and positive proof.

It is now necessary for you to determine the amount of such damages. My next instructions will be devoted to assisting you in determining these amounts.

Plaintiffs' witnesses Kenney, Mendelson, Davis, Lieblich and Gonzalez, all were qualified as expert witnesses. They were entitled to give their opinion as to profits which the plaintiff bowling centers would have made but for defendant's violations of law. These witnesses estimated the amount of business which would have come to plaintiffs' bowling centers if Brunswick had not operated a competitive center or had permitted it to close down in the normal course. Their opinion varied to some extent and the range of damages reflected by the opinions is reflected on Plaintiffs' Exhibit 53 in evidence.

Although there was some differences in amount, these witnesses mutually corroborated each other both in the methods used in determining damages and in general estimates as to the extent of damages.

[4737]

I instruct you that if you believe any one of Messrs. Kenney, Mendelson, Davis, Lieblich and Gonzalez was telling the truth, then you must believe that all were telling the

truth since they mutually corroborated each other and since there was no contradictory evidence offered by Brunswick as to extent of damages, except that the defendant denies that the plaintiffs are entitled to any damages.

With regard to plaintiffs' Request #120, I will charge: You may disregard this testimony as to damages only if you find all these witnesses, Messrs. Kenney, Mendelson, Davis, Lieblich and Gonzalez, were discredited or impeached by contradictory evidence. I instruct you that if you find that the antitrust laws have been violated and that plaintiffs' corporations have been injured thereby, then you must also find damages in the amounts falling within the range as indicated by the testimony and exhibits, apart from any determination you may make as to those damages related to Fort Lauderdale and to plaintiffs' various interest expenses.

[4738]

I instruct you lady and gentlemen that there is evidence in this case, documentary evidence in this case, indicating that if it is found that Brunswick violated the provisions of the Sherman Act relied upon by the plaintiffs, the following estimate of damages to the following bowling centers have been made and placed in evidence by the plaintiffs and/or their witnesses:

Pueblo Bowl-O-Mat, damages within the range of $96,830 to $1,072,030.

Holiday Bowl-O-Mat damages within the range of $298,000 to $373,500.

Paramus Bowl-O-Mat damages within the range between $1,094,400 to $1,276,800.

Paradise Bowl-O-Mat damages within the range of $997,600 to $1,197,120.

Plaintiffs' evidence shows that the parent company, Treadway, suffered the following losses as the result of the closing of Fort Lauderdale Bowl-O-Mat in late 1964:

$89,250 representing the stock investment of Treadway; $343,000 representing notes payable to Treadway; total, $432,250.

If you find that the Franklin National Bank and Indianapolis State Bank loans resulted from

[4739]

the exercise of Brunswick's national monopoly power is applied to the credit of its customers, Treadway and Indianapolis Bowl-O-Mat, then you may also find that Treadway and Indianapolis Bowl-O-Mat were injured as follows:

A, plaintiffs' evidence shows that the additional interest required to pay off the five-year loan by Franklin National Bank to Treadway was $27,031.65; and

B, plaintiffs' evidence shows that the additional interest Indianapolis Bowl-O-Mat and/or Treadway had to pay Indiana National Bank to pay off the Brunswick loan was $14,089.

If you do not find that Brunswick monopolized or attempted to monopolize the national market for bowling center operations, but you do find that Brunswick monopolized or attempted to monopolize one or more of the local markets for bowling center operations, Pueblo, Poughkeepsie, Paramus, San Juan or Fort Lauderdale, you may find that the evidence shows that Brunswick caused damages to one or more of these remaining individual plaintiffs.

If you find that Brunswick caused such damage then you must determine the amount of such damage.

[4740]

You may calculate damages by considering the evidence I have referred to for such individual plaintiffs with respect to the national market.

For example, if you do not find that Brunswick monopolized or attempted to monopolize the national market for bowling center operations, but do find that Brunswick monopolized or attempted to monopolize the local market in Pueblo, Colorado, then you may find on the basis of the evidence that Pueblo Bowl-O-Mat suffered damages of anywhere from $964,830 to $1,072,030.

You should make the same calculations for Poughkeepsie, Paramus, San Juan and Fort Lauderdale.

If you find that Brunswick similarly injured Holiday Bowl-O-Mat, the same calculations will yield from $298,800 to $373,500 in damages.

If you find that Brunswick similarly injured Paramus Bowl-O-Mat, the same calculations for four years will yield from $1,094,400 to $1,276,800 in damages.

If you find that Brunswick similarly injured Paradise Bowl-O-Mat, the same calculations for seven years would yield from $997,600 to $1,197,120 in damages.

[4741]

If you find that Brunswick similarly injured Treadway by reason of the closing of Fort Lauderdale Bowl-O-Mat, the calculation above will yield $432,250 in damages.

It is clear from these instructions that if you find that Brunswick neither monopolized the national market nor monopolized any of the local markets, you must calculate damages in the same manner if you find that Brunswick attempted to monopolize any of these markets.

Under either circumstances you must calculate the damages in the same manner I have previously described.

If you do not find that Brunswick either monopolized the national market or monopolized any of the local markets or attempted to monopolize any of the local markets, you may still assess damages if you find that Brunswick violated Section 7 of the Clayton Act.

Brunswick violated Section 7 of that Act if you find that its acquisition of any of Belmont Lanes, Dutchess Lanes, Interstate Lanes, Fair Lawn, Lodi Lanes, Ten Pin Lanes, had the effect of substantially lessening competition or of tending to create a monopoly.

[4742]

Or if you find that Brunswick did monopolize or attempt to monopolize some of the local markets but not all, then if any of the local markets I have just named were not among them, you must still consider them under Section 7. You must assess damages if you find that Brunswick acquired one of those last named local markets with the effect of substantially lessening competition or tending to create a monopoly.

If you find that Brunswick acquired one of these local bowling centers with such an effect, then you must assess damages with respect to that local market in the same way I have previously described in connection with monopolization and attempted monopolization.

I must caution you again at this point that you and you alone are the sole judges of the facts. You, as members of this jury, after careful deliberation, after carefully weighing all the evidence and the inferences to be drawn therefrom, have to decide what damages, if any, are to be awarded to the plaintiffs.

Plaintiffs are separately charging the defendant with violations of two statutes, both of which are among the federal statutes commonly

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known as antitrust laws.

Each of the six plaintiffs named above charges the defendant with having violated Section 2 of the Sherman Act.

Each of them except Paradise Bowl-O-Mat, Inc. and Indianapolis Bowl-O-Mat, Inc., and Fort Lauderdale, also charges the defendant with violations of Section 7 of the Clayton Act.

I will explain the provisions of each of those statutes to you, insofar as they bear on the issues which you are to decide.

[4744]

Each of the plaintiffs has charged the defendant with having monopolized or attempted to monopolize the business of operating bowling centers in a local area in which such plaintiff (or, in the case of Treadway Companies, Inc., a former subsidiary of such plaintiff) operates or has operated one or more bowling centers and the defendant Brunswick also operates or has operated one or more bowling centers, except that the plaintiffs Paradise Bowl-O-Mat, Inc. and Indianapolis Bowl-O-Mat, Inc., charge the defendant with having monopolized or attempted to monopolize the bowling center business in San Juan, Puerto Rico, and in Indianapolis, Indiana, respectively, where the defendant never operated a bowling center.

The plaintiff's claim that the defendant Brunswick has acquired monopoly power throughout the United States, but the defendant is not charged with having exercised such power to the damage of plaintiff elsewhere than in the particular Poughkeepsie, Pueblo, Paramus, Fort Lauderdale, San Juan, Puerto Rico and Indianapolis local areas with respect to which each plaintiff claims that

Brunswick has monopolized or attempted to monopolize the business of operating bowling centers.

To "monopolize," as that word is used in Section 2 of the Sherman Act, means to acquire

[4745]

and maintain monopoly power over some part of interstate trade or commerce, coupled with the exercise of or with an intent to exercise such monopoly power.

"Monopoly power" means power to fix prices in or exclude competitors from a market.

"Attempt to monopolize," as those words are used in Section 2 of the Sherman Act, means the doing of an act or acts looking toward an acquisition of monopoly power, but falling short of achieving such power, coupled with a specific intent to acquire monopoly power and a reasonable likelihood that such act or acts would lead toward the achievement of such power.

Although the mere possession of monopoly power, coupled with an exercise of or an intent to exercise such power, violates the "monopolize" part of Section 2, a private party, such as the plaintiffs here, in order to be entitled to recover damages on account of such violation, must show that the defendant has exercised monopoly power which has proximately caused damage to the plaintiff's business or property, and must prove the amount of such damage.

The fact that the defendant Brunswick is a manufacturer of bowling equipment and supplies does not make it unlawful for Brunswick to enter the business

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of operating bowling centers even though in doing so it may compete with other bowling center operators who purchase their equipment or supplies from Brunswick.

Although monopoly power sometimes may exist by reason of the share of a particular market held by an alleged monopolist, you are instructed as a matter of law that such share of the market must be large enough to enable the possessor of such power to fix prices in such market or to exclude others from competing in such market before it can constitute "monopoly power."

The defendant Brunswick is not legally disqualified from competing against other bowling center operators in any market merely because it may be larger and wealthier than its competitors, or because the equipment in its centers may have been acquired by it at lower cost than other competitors may have paid for similar equipment, or because in certain respects Brunswick's costs of operating bowling centers may be lower than those of some other competitors. These are fair business advantages which any competitor has a right to utilize for the successful operation of its business, provided it does not use them to exert monopoly power against its competitors.

[4747]

Each of the plaintiffs, in order to recover damages from the defendant under its charge of monopolization, must prove with respect to the market area where it claims that such monopolizing occurred, each and all of the following facts:

One, that the defendant had power to fix prices in or to exclude competitors from the operation of bowling centers in such area;

Two, that the defendant exercised such power with the effect of fixing prices in or of excluding a competitor or competitors from such business in such area, and

Three, that such exercise of such power was the proximate cause of damage to such plaintiff's business or property.

Each of the plaintiffs, in order to recover damages from the defendant under its charge that the defendant attempted to monopolize, must prove with respect to the market area where it claims that such attempted monopolization occurred, each and all of the following facts:

One, that the defendant in such area did an act or acts looking toward the achievement of monopoly power in such area;

Two, that the defendant did such act or acts

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with the specific intent of achieving monopoly power;

Three, that such act or acts were of such nature as to give rise to reasonable probability that they would lead to the achievement of monopoly power by the defendant in such area; and

Four, that such act or acts were the proximate cause of damage to the plaintiff's business or property.

If you find from a preponderance or greater weight of the evidence that Brunswick went into the business of operating bowling centers with a predominant intent of utilizing repossessed bowling equipment to produce cash with which to pay its debts, or with a predominant intent of protecting the collectibility of monies owed to it by bowling center operators on equipment purchase contracts, or for both of such purposes, and not for the purpose of injuring any other operator of bowling centers, the entry of Brunswick into the bowling center business would not be evidence of a specific intent to acquire monopoly power.

Brunswick, for the purpose of collecting as much as it could of the monies owed to it by bowling center proprietors for the purchase price

[4749]

of bowling equipment, was not required as a matter of law to deal on identical terms with all bowling center proprietors who became delinquent in their payments to it, provided it did not discriminate among them with the specific intent of acquiring monopoly power.

Brunswick had a right to determine in each case the steps which it believed would be most appropriate or effective toward collecting the delinquent indebtedness.

It could decide in each such case whether or not to extend the indebtedness and, if it decided to do so, to further decide the terms on which it would grant the extension.

It also had the right to decide whether or not to repossess the equipment of a delinquent operator and, if it decided to do so, to further decide when it would do so.

If you find from a preponderance or greater weight of the evidence that Brunswick consistently followed a policy of extending the indebtedness of delinquent operators when it believed that such operators thereby would be able to pay Brunswick on the extended terms, that it did not repossess the equipment of delinquent operators until it

[4750]

had exhausted all reasonable possibility that such operators could and would pay their indebtedness to it, and that in following such policies it did not discriminate among bowling center operators for the purpose of injuring any such operator, actions by Brunswick pursuant to such policies would not be evidence of any specific intent to acquire monopoly power.

It is lawful for a competitor to lower its prices for the purpose of competing more effectively with others. If you

should find it to be a fact that in any instance Brunswick lowered the prices which it charged the public for bowling at one or more of its bowling centers, either by charging a lower cash price or by offering inducements of other kinds, and if you should further find that Brunswick did so for the predominant purpose of meeting competition and thereby protecting the business of its own centers, or for the predominant purpose of generating bowling in its centers by creating new bowlers, and not for the purpose of injuring any competitor, such actions by Brunswick would not indicate a specific intent on its part to acquire monopoly power.

All of the plaintiffs except Paradise

[4751]

Bowl-O-Mat and Indianapolis Bowl-O-Mat and Lauderdale, also charge that the defendant violated Section 7 of the Clayton Act and that such plaintiffs were damaged by such violation. Section 7 provides, insofar as it applies to this case, that no corporation engaged in interstate commerce may acquire the whole or any part of the stock or assets of another corporation engaged also in interstate commerce where, in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly.

[4752]

The plaintiff Holiday Bowl-O-Mat, Inc., charges that the defendant violated Section 7 of the Clayton Act by acquiring assets of the bowling center known as Dutchess Lanes in Poughkeepsie, New York, from Lence Lanes Corporation, which said plaintiff alleges was engaged in interstate commerce. The plaintiff Pueblo Bowl-O-Mat, Inc., charges that the defendant violated Section 7 by acquiring

assets of Belmont Lanes, in Pueblo, Colorado, from National Bowlers Corporation, which said plaintiff alleges was engaged in interstate commerce. Plaintiff Bowl-O-Mat Paramus Operations charges that the defendant violated Section 7 by acquiring the stock of Fair Lawn Lanes, in Fair Lawn, New Jersey, and Interstate Lanes, in Ramsey, New Jersey, at a bankruptcy sale of the assets of American International Bowling Corporation, which previously owned such stock.

Each of these plaintiffs, to be entitled to prevail on its claim under Section 7 of the Clayton Act, must prove each and all of the following facts:

First, that the assets acquired by the defendant were acquired from a corporation engaged in interstate commerce;

Second, that the acquisition of such assets or stock by the defendant has substantially lessened competition or has resulted in Brunswick's monopoliz-

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ing the business of operating bowling centers in the area where such assets or stock were acquired, and

Third, that by reason thereof the plaintiff has suffered damage proximately caused by such acquisition.

If you should find from a preponderance or greater weight of the evidence that the defendant, Brunswick, is entitled to a verdict on any or all of the plaintiffs' claims, you will not reach the question of the amount of damages sought by the plaintiffs under those claims.

If you should find from a preponderance or greater weight of the evidence that any of the plaintiffs is entitled to a verdict on its claim or claims, you then should determine the amount of damages, if any, suffered by such plaintiff as the direct and proximate result of the defend-

ant's acts in violation of the Federal antitrust laws as found by you with respect to such claim or claims.

The amount of such damages need not be determinable exactly from the evidence, but must be limited to such amount as you could reasonably estimate from the evidence. Damages which are purely speculative,

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or with respect to which the evidence provides no basis for a reasonable estimate, should not be awarded.

None of the plaintiffs could be entitled, in any event, to recover as damages any claimed loss of profits which you might find from a preponderance or greater weight of the evidence to have resulted from lawful competition between such plaintiff and the defendant, or from any other lawful business conduct of the defendant.

I repeat, you are concerned only with the second and third claims of the plaintiffs.

The second claim of the plaintiffs Pueblo, Holiday, Paramus, Paradise Treadway on behalf of Fort Lauderdale and Treadway itself, charges monopolizing the business of bowling centers in certain areas by Brunswick and in other instances, attempting to monopolize, on behalf of Pueblo, Holiday, Paramus, Treadway on behalf of Fort Lauderdale and Indianapolis Bowl-O-Mat.

The third claim of the plaintiffs Pueblo, Holiday and Paramus charges the defendant violated Section 7 of the Clayton Act by its acquisition of Belmont Lanes in Pueblo, Colorado; Dutchess Lanes in Poughkeepsie, New York; Fair Lawn Lanes in Fair Lawn, New Jersey; and Interstate Lanes in Ramsey,

[4755]

New Jersey.

As you know by now, the defendant denies all these charges.

Your verdicts in this case must be unanimous on all claims, namely, 6 to 0. Separate unanimous verdicts must be returned on each claim. Your verdicts in this case must represent the considered judgment of each juror.

[4756]

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without doing violence to your individual judgment or conscience.

Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors.

In the course of your deliberations do not hesitate to examine and re-examine your views, and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times during the course of your deliberation that you are not partisans, you are judges, judges of the facts of this case. And your sole function here is to ascertain the truth from all the evidence and to render a just and true verdict, using your good sense as reasonable people.

I will excuse you now in order to consult with counsel. You don't have to go back to your

[4757]

room. Just step outside, having a smoke, and I will call you right back in a couple of minutes.

(The jury left the courtroom.)

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[4757D]

(The jury returned to the courtroom, and the following proceedings were had within their hearing and presence:)

The Court: Now a few closing remarks and then you can retire to your deliberations. And the exhibits will be made available to you.

Traditionally Juror No. 1 acts as the foreman of the jury. The foreman will preside over your deliberations and will be your spokesman here in court.

In your deliberations you may vote in any manner you please, by paper ballot, by show of hands, or any other method you choose. Remember, you are never to reveal to any person, not even to the Court, how the jury stands, numerically or otherwise, until after you have reached unanimous verdicts in this case.

If you need assistance during your deliberations, communicate with the Court in writing, signed by your foreman or by one of your members on behalf of the jury, and I will try to help you.

[4758]

I have prepared for you forms of verdicts. They are not to be used in your deliberation. After you have completed your deliberations you should then complete them.

They are as follows:

Under the second claim we find in favor of the plaintiff Pueblo Bowl-O-Mat and against the defendant, and assess damages at dollars, blank; or, under the second claim we find in favor of the defendant Brunswick and against the plaintiff Pueblo Bowl-O-Mat.

Under the second claim we find in favor of the plaintiff Holiday Bowl-O-Mat and against the defendant, and assess damages, dollar sign; or under the second claim we

find in favor of the defendant Brunswick and against plaintiff Holiday Bowl-O-Mat.

Under the second claim we find in favor of the plaintiff Paramus Bowl-O-Mat and against the defendant Brunswick, and assess damages, dollars; or under the second claim we find in favor of the defendant Brunswick and against plaintiff Paramus Bowl-O-Mat.

Under the second claim we find in favor of the plaintiff Paradise Bowl-O-Mat and against

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the defendant, and assess damages at, dollars; or under the second claim we find in favor of the defendant Brunswick and against the plaintiff Paradise Bowl-O-Mat.

Under the second claim we find in favor of the plaintiff Treadway (losses suffered by the closing of Fort Lauderdale Bowl-O-Mat), and against the defendant, and assess damages at dollar sign; or, under the second claim we find in favor of the defendant Brunswick and against the plaintiff Treadway.

Under the second claim we find in favor of the plaintiff Treadway (losses suffered by interest charges) and against the defendant Brunswick, and assess damages at dollars, blank; or under the second claim we find in favor of the defendant Brunswick and against the plaintiff Treadway.

Under the second claim we find in favor of the plaintiff Indianapolis Bowl-O-Mat (losses suffered by interest charges) and against the defendant, and assess damages at; or under the second claim we find in favor of the defendant Brunswick and against the plaintiff Indianapolis Bowl-O-Mat.

[4670]

On the third claim we find in favor of the plaintiff Pueblo Bowl-O-Mat and against the defendant, and assess

damages at dollars, blank; or on the third claim we find in favor of the defendant Brunswick and against the plaintiff Pueblo Bowl-O-Mat.

On the third claim we find in favor of the plaintiff Holiday Bowl-O-Mat and against the defendant, and assess damages at dollars blank; or on the third claim we find in favor of the defendant Brunswick and against the plaintiff Holiday Bowl-O-Mat.

On the third claim we find in favor of the plaintiff Paramus Bowl-O-Mat and against the defendant, and assess damages at dollars; or on the third claim we find in favor of the defendant Brunswick and against the plaintiff Paramus Bowl-O-Mat.

In the event that you should find for the defendant on all plaintiffs' claims, your verdict should be, "We find in favor of the defendant and against the plaintiffs on all of the plaintiffs' claims."

Now, I would be remiss in my duty as a judicial officer if I didn't state this for the

[4761]

record. It is a pleasure and an honor for me to have these competent attorneys appear in this court, and I mean that very, very candidly. This case has been tried in the true tradition of this profession which all of us are in, and again, I just want to thank the attorneys for the way they have conducted themselves in this courtroom.

After the marshal is sworn——

Mr. Hoffmann: Is it appropriate, your Honor, for us to express, I am sure both of us, our heartfelt feelings for your patience, your tolerance and your wisdom in the face of this long trial, and your fairness?

The Court: Certainly.

Mr. Seeley: I certainly join in that, your Honor.

The Court: Thank you very much.

(A deputy marshal is duly sworn.)

The Court: I almost forgot Mr. Britton sitting over there. He is like the tenth baseball player set up by the American League.

Mr. Britton, I say to you very, very sincerely, perhaps briefly, you have been very attentive in all of these proceedings, but as you know from the initial instructions I gave you

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when this case first started, you are an alternate juror and you are not permitted to join the other alternate jurors.

If you will wait downstairs the marshal will get your lunch, then you can go to my chambers, Room 311, and have your lunch in there.

Again, I am sure counsel join with me when I say to you that we really appreciate the services that you have rendered as an alternate juror.

Now, members of the jury, again I am very grateful to you for the services you have rendered.

Counsel, please get together on all of the exhibits.

(At 12:05 p.m. the jury retired to deliberate.)

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[4766]

MORNING SESSION.

(The following proceedings were had at side bar, without the hearing or presence of the jury:)

The Court: I just want to spread this on the record. I don't know whether I did last night, but I had counsel's

permission to let this jury go to dinner from 6:15 to 7:15. Mr. Bigger gave me permission on your behalf, and Mr. McNeill pursuant to telephonic conversation gave this Court permission on behalf of the defendant in this cause.

I have before me a brown envelope. This is my practice, incidentally. My law secretary opened it partially, and then he realized I do not permit this. I always have the envelope opened in front of counsel and on the record.

I don't know what is in it. I now hand it to Mr. Hoffmann, attorney for the plaintiffs, and ask him to open it, and ask him to read what it says into the record.

I hope it is not critical of anybody, that's all.

Mr. Hoffmann: "Please clarify the following:

[4767]

Section 2 of the Sherman Act, Section 7 of the Clayton Act, and can we find in favor of the plaintiff in one center and in favor of the defendant in another center, or must one verdict be applied to all centers?

"Foreman, George Pfeiffer.

"P. S. Will the last section of your charge answer these questions? If so, please read it."

The Court: Now, what I'd like you to do is, I'd like you to all sit down at the counsel table and think about it. And I will talk to Mr. Sokol about it rather than take this from you, and then we will decide on how to answer it.

If it is not too lengthy I want you also to consider that we either type it or write it out in longhand and send it back. I frown upon bringing the jury back into the courtroom for two minutes.

Do I have your permission to have Miss Costello Xerox these?

Mr. Seeley: Yes.

(Short recess.)

The Court: Now I will hear from you, Mr. Hoffmann, on the requests submitted to the Court by the jury. Yes?

[4768]

Mr. Hoffmann: If your Honor please, the first paragraph after reference to clarifying Section 2, Section 7, if I may hold that for just a moment, the first paragraph thereafter is, "Can we find in favor of the plaintiff in one center, in favor of the defendant in another center," and I think it is quite clear from your Honor's instructions, of course, the answer is yes.

"Or must one verdict be applied to all centers."

And I think the answer to that is no.

The Court: Well, that's not accurate.

There could be one verdict as to all centers in favor of the defendant.

Mr. Hoffmann: The question is, "Or must one verdict be applied to all centers."

I think from the verdicts that were handed to the jury, it is clear that it can be done in any alternative.

The Court: Yes, all right.

Mr. Hoffmann: In relation to the first matter, now, I would hope that your Honor would read in some of your charges on Section 2 and Section 7 of the Clayton Act.

We have done the following: We have indicated

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the charges that we feel from our own presentation that the Court had accepted and made part of the charge ought to be read, and perhaps there are others.

And we also have some—the references to your own charges which we think should be read.

I don't know if you wanted me to trouble the record by reading these numbers aloud.

The Court: Have you got them numbered?

Mr. Hoffmann: Yes.

The Court: What is the number? I think that would be sufficient. I'm just thinking about your requests.

Mr. Hoffmann: This is from our requests which was used by the Court.

Section 2 of Sherman, numbers 39, 40, 41, 43, 44, 46, 49, 51, 53, 65, 66, 67 and 74.

The Court: How about 66?

Mr. Hoffmann: 65, 66, 67 and 74.

And the Section 7 aspect from our charges, 81, -3, -4, -5 and -6, -7 and -8.

In other words, it is 81, then 83 to 88, and then 101, 102, 103 and 103A.

Now, your Honor, we, of course, would be most content if your Honor were to select whatever

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charges your Honor thinks are most appropriate to read from the whole welter of charges that were read yesterday.

And if you were to follow the course of reading the ones that we wish and the ones that defense counsel might supply you, that they wish, if that course is followed, then this time I would urge you to read ours in second position rather than in the first, out of fairness, since yesterday was just the reverse.

The Court: With regard to the proposed verdicts?

Mr. Hoffman: Yes.

The Court: Now, Mr. McNeill or Mr. Seeley.

Mr. Hoffmann: Would this serve any utility for you? These are your own charges which you read, which I take it were not proposed by either side, but which were from the Court.

Would this reference to them be of any value to you?

Mr. McNeill: Are they numbered?

Mr. Hoffmann: Pages of the transcript indicated.

The Court: I have had handed to me, and I will give you the sheet shortly, Mr. McNeill and

[4771]

Mr. Seeley, it is entitled, "Judge Whipple's charges, Section 2, transcript, 4667, defines monopolize, outline three essential facts or conditions, transcript 4669-70, defines attempt to monopolize, refers to natural and probable consequences, transcript 4671, intent as shown by direct and indirect, transcript 4672, specific intent, not necessary to prove ability to achieve monopoly, transcript 4673, specific intent, transcript 4674, trade or commerce, transcript 4675, again defines monopolization and attempt, 4676, size alone, etc., power to exclude, etc."

I'm just reading this for the record. I will give you this sheet in a minute.

Section 7, transcript 4677, four elements, 4678, three elements, 4679, several factors, re: tendency, etc., 4681, plaintiff's burden, 4682, proximate cause, 4683, failing company.

I think in all fairness you should take this, Mr. McNeill or Mr. Seeley, take a look at it and we will recess.

(Short recess.)

[4772]

Mr. Seeley: May I inquire when we will have a complete transcript of the instructions which we don't have as yet? I think it is a handicap to try to attack this problem without a complete set of the instructions.

I am troubled by the fact, as is quite obvious already, what sounds like a very simple request really spreads out and becomes a request to restate the bulk of the instructions.

The Court: And I'm not surprised, very frankly.

Mr. Seeley: In view of the size of the problem I should like to get that transcript and come to court at 2:00 o'clock.

The Court: I will give you every opportunity to do it. I don't know whether I will wait until 2:00 o'clock.

I'd like to hear your arguments now on the requests as submitted to me.

Mr. Hoffmann: May I make this observation, that the transcript given us goes right through your substantive charges, and it breaks off in the midst of your notes as to the evidence.

Now, my recollection is that after that what went on had to do with the matter of

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damages, the substantive elements are all completed in this transcript as we have it in front of us.

The Court: Now I will hear you, let me hear your adversary on it, if you are ready to argue, on the requests as submitted.

Mr. Seeley: The requests?

The Court: Just what the jury has inquired of this Court today.

Mr. Seeley: Well, I agree with Mr. Hoffmann on the fact that they should be told they can return either separate verdicts or all for the plaintiff or all for the defendant. They do not have to return the same verdict as to each center.

The Court: Suppose we just think of this, and I address this to all counsel, in answer to the–let's call it the second part of the first paragraph, you may find in favor of the plaintiff in one or more centers or you may find in favor of the defendant in one or more centers.

One verdict does not necessarily have to be applied to all centers.

Mr. Seeley: That's fair.

The Court: I think it is understandable. I may be wrong, but I just wrote this out in my

[4774]

chambers.

Mr. Hoffmann: I agree.

The Court: Do you want to argue the other part, Sections 2 and 7, or do you want to read the transcript first?

Mr. Seeley: I want to read the transcript first.

The Court: I will permit this jury to go out for an early lunch.

What do you think about that?

Mr. Hoffmann: I am just hopeful that counsel's zeal for preparation at this point will not result in this jury being hung over the weekend or any unnecessary time

being devoted to answering their inquiry. We have used the time to good advantage and are content with the–we are content with the transcript as it is because we don't think the rest of the transcript has anything to do with the matter.

The Court: You may sit down, unless you want to speak to me further.

Mr. Seeley: No.

The Court: Let me give you my thoughts on this: It is the Court's intent to repeat Section 2 of the Sherman Act. I don't think I

[4775]

have to repeat it for the record.

"Every person who shall monopolize, or attempt to monopolize, any part of the trade or commerce among the several states shall be guilty of violating the law.

"Section 7 of the Clayton Act provides:

"No corporation shall acquire, directly or indirectly, the stock or assets of another corporation where the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly.

"I also charge you that:

"The term 'monopolize' as used in the antitrust laws refers to the power allegedly obtained and maintained by the defendant for the purpose of removing or excluding competitors from the field of competition in a particular business or industry, in this case, the operation of bowling centers.

"In this case the defendant has monopolized within the meaning of the antitrust laws if:

"One, it knowingly obtained or maintained monopoly power to remove or to exclude or keep out competitors from the field of competition.

"Two, that the defendant possesses that

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power.

"Three, that it has the purpose and intent to exercise that power to exclude or remove as to cause injury to the business of one or more of the plaintiffs.

"Of course, if the power to remove or exclude competitors has been exercised and if, as a result of the exercise of such power, one or more competitors have been removed or excluded, monopolization has clearly occurred; but it is not necessary that competitors actually be removed or excluded from the field of competition if it appears from a preponderance of the evidence in the case that the three essential facts or conditions just stated have in fact occurred.

"The term 'attempt to monopolize' involves two essential elements:

"One, a specific or purposeful intent to monopolize.

"Two, some act done in furtherance of that intent, but insufficient to produce a monopoly. In order to find an attempt to monopolize, both elements—the intent and the act—must appear, and must together result in a reasonable probability that a monopoly will sooner or later occur.

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"I further charge you if under the instructions of this Court and the requests to charge of the plaintiffs and the defendant, which I have given to you, and which you will consider together with my regular instructions, you should

find that the plaintiffs or any one of them are entitled to a verdict, the law provides that the plaintiffs or any one of them are to be fairly compensated for all damages, if any, to his business or property which was proximately caused by the defendant's conduct, in violation of the antitrust laws.

"In arriving at the amount or amounts of award, if any, you should include all damages suffered by the plaintiffs or any one of them, because of lost profits; that is to say, profits which the plaintiffs or any one of them would have made but for the violation of the antitrust laws.

"If you find that the plaintiffs or any one of them has in fact suffered damage to his business or property, such as a loss in profits, proximately caused by the alleged illegal conduct of the defendant complained of, then the circumstance that the precise amount of plaintiffs' or any one of their damage claims may be difficult to ascertain, should not affect plaintiffs' recovery.

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"On the other hand, the plaintiffs or any one of them are not to be awarded remote or purely speculative damages. An allowance for lost profits may be included in the damages awards, if any, only when there is some reasonable basis in the evidence for determining that plaintiffs have in fact suffered a loss of profits, even though the amount of such loss is difficult of ascertainment."

Now, that's taking certain segments of my charge, very frankly. I'm trying to make it as simple as possible for this jury to understand and comprehend.

Do you want to wait and see the transcript?

Mr. Seeley: No, I think if I may have the court reporter read back the first part of it quite slowly, then I

will be able to address myself to it without waiting for the transcript.

I take it your Honor is suggesting that might be the way you would be answering the inquiry?

(Short recess.)

Mr. Seeley: Let me say first that the defendant agrees with what appears to be the view of the Court, that what the jury needs at this time is a fairly brief and succinct restatement of Section 2 and Section 7 in the Court's own

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words.

We think it would be inappropriate and probably not very helpful to the jury for the Court to re-read some 30 or 40 of the instructions which were given at the request of plaintiffs—the parties, both parties.

The Court: I am trying to streamline it, I am trying to bring it home in everyday language with them.

Mr. Seeley: I am saying that we are in sympathy. I have read what your Honor stated from the bench a few minutes ago as a suggestion, and the defendant has two objections to it which I will state.

The Court: Please.

Mr. Seeley: In summarizing the provisions of Section 7, the Court says, "No corporation shall acquire, directly or indirectly, the stock or assets of another corporation."

I would like to make the point again that the statute says "No corporation engaged in commerce shall acquire the stock or assets of another corporation engaged in commerce," and that Section——

The Court: You lost me for a minute.

No corporation engaged in commerce?

[4780]

Mr. Seeley: That's right.

The Court: Shall acquire directly or indirectly the stock or assets of another corporation engaged in commerce?

Mr. Seeley: And Section 1 of the Clayton Act, that the Act says that the word "commerce" for the purposes of the Clayton Act, means trade and commerce among the several states, so that the word "interstate" should go in there.

The Court: Anything else, Mr. Seeley?

Mr. Seeley: Yes. The other with respect to the proposed instruction on monopolization.

The Court—now, let me see——

"In this case the defendant has monopolized within the meaning of the antitrust laws if:

"One, it has knowingly obtained or maintained monopoly power to remove or to exclude or keep out competitors from the field of competition.

"Two, that the defendant possesses that power.

"Three, that it has the purpose and intent to exercise that power to exclude or remove as to cause injury to the business of one or more of the plaintiffs."

And then the next paragraph, the Court goes on to say:

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"Of course, if the power to remove or exclude competitors has been exercised, and if, as a result of the exercise of such power, one or more competitors have been removed or excluded, monopolization has clearly occurred; but it is not necessary that competi-

> tors actually be removed or excluded from the field of competition if it appears from a preponderance of the evidence in the case that the three essential facts or conditions just stated have in fact occurred."

Your Honor, it is perfectly correct, as an abstract proposition of law, that monopolization may occur if monopoly power is possessed and if it is either exercised or there is an attempt to exercise it.

But this is a damage case. In equity cases where the purpose of the action is to forestall threatened damage in the future it is not necessary to prove that the power has been exercised or that the damage has yet occurred. It is only necessary in such a case to prove that the power exists and that the defendant intends to use it, in which case he may be enjoined from using it.

But this is a damage case. This jury is not

[4782]

at all concerned with equity issues, and people are not damaged by intentions, however unfriendly. They are damaged by acts.

And it is, therefore, our position that in this case, in the context of the issues here, it is confusing and misleading to give to the jury the abstract proposition that a party may be guilty of monopolizing if he only has the power and the intent.

It is our position that this being a damage case, the instructions should be limited to the statement that monopolization in the context of this case means possession of the power to exclude and the exercise of that power resulting in damage.

Those are my two points, your Honor.

The Court: Thank you, Mr. Seeley.

Mr. Hoffmann: If your Honor please, I think your monopoly charge, if I may say so, having in mind the apple, is as clear as it could possibly be.

I think that the monopoly charge has been somewhat confused in the presentation because the problem is not private suit as against public suit; the problem for the private suit is simply

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to prove causative damage. Otherwise the tests are the same.

If I may make the observation, this distinction between the equity case and the damage case I submit has no precedent anywheres in antitrust learning. It is, of course, a question of has there been, has there been something proximate which has caused damage to the plaintiff.

And as to that, your charges couldn't be clearer, because if the power to remove or exclude has been exercised and if as a result of the exercise of such power one or more competitors have been removed or excluded, monopolization has clearly occurred.

> "But it is not necessary that competitors actually be removed or excluded from the field of competition if it appears from a preponderance of the evidence in the case that the three essential facts or conditions just stated have in fact occurred."

Now, these three include knowingly obtaining or maintaining monopoly power to remove or exclude or to keep competitors from the field of competition. That I would suppose would satisfy Mr. Seeley. If we have not been hurt by this then of course it

[4784]

makes little difference whether there was a monopoly or

not. And I think your charge makes that as clear as any words could make.

I think that I should wryly observe in any case that it is still an equity case here, this is not only a damage case but it is an equity case. There is nothing that turns on that, your Honor.

This is not a criterion of monopoly power. You don't have one different monopoly power for a case in law and another one for a case in equity.

You don't have different guides as to what is illegal in law and equity under the antitrust laws.

The only single question you have is assuming the liability is there, assuming the illegal conduct took place, was the plaintiff hurt by it.

The Court: What have you got to say with regards to the insertion of the words requested by the defendant?

Mr. Hoffmann: I think that's going to cause a great deal of trouble for the jury, and I think it is designed really to put the jury in some sort of confused state.

[4785]

We have charges, you have charges that you read yesterday which relate to commerce.

Now, there isn't any doubt that Brunswick is in commerce. That's admitted in pleadings, so the jury shouldn't spend any time trying to figure out whether or not Brunswick is in commerce.

That's the first word he would have inserted.

Then the next question is should there be the word "commerce" applied to the acquired company. That bides a whole line of legal decisions.

There is other language in Section 7 that's a guide to that as well, is the business subject to the jurisdiction of

the Federal Trade Commission, and so forth, which we haven't put into this charge.

Your Honor, I don't even think there is a fact question about commerce in this case either for the acquired company or for the acquiring company. But to put it in here it seems to me is to invite the jury to labor over what is meant by being in commerce.

I would rather see the whole statute read than have it excerpted in this fashion, but I see nothing wrong or misleading about the way your Honor has done it.

[4786]

I think it is precise and it takes out the guts of the section, which is what the jury should be concerned with, and I think that the commerce aspect of it is just a red herring, and it shouldn't be pulled in here.

The Court: The objections for the defendant are noted on the record.

Bring the jury down, please.

Mr. Seeley: Will we have the same understanding, that in the event my objections are not accepted, that it will be assumed on the record that I have taken an exception to——

The Court: Well, exceptions aren't necessary. I will let them remain on the record.

Mr. Hoffmann: Could I raise a point, your Honor?

It troubles me a little bit.

I'm not sure that I know how to solve the problem. Yesterday your Honor read with great precision, I thought, the damage consideration, charged the jury about them.

And today in the last paragraph it says, "On the other hand, the plaintiffs or any one of them are not to be awarded remote or purely speculative damages."

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I would like at this late stage to have some modification of this paragraph to indicate that plaintiffs have relied on Exhibit 53 to show damages.

Now, it is true that in your charge yesterday you pointed to that and pointed to the fact that one of the witnesses corroborating the—the exhibit also corroborates the other witness who corroborates the exhibit. But this may suggest to the jury that the plaintiff has only made a showing of remote or purely speculative damages, and I submit that if the jury finds liability, Plaintiffs' Exhibit 53 isn't subject to that characterization.

The Court: You just read that sentence. How about the next sentence:

> "An allowance for lost profits may be included in the damages awarded, if any, only when there is some reasonable basis in the evidence for determining that plaintiffs have in fact suffered a loss of profits, even though the amount of such loss is difficult of ascertainment."

Mr. Hoffmann: I think that's probably the counterpoint.

[4788]

The Court: I think so.

Mr. Hoffmann: I just hope 53 doesn't get lost.

The Court: I konw you hope it doesn't get lost, but the defendant hopes it gets lost. Never the twain shall meet.

Have the marshal bring the jury down, please.

I don't recall, Mr. Reporter, whether I made a ruling on Mr. Hoffmann's last request.

I decline it, for the record.

Mr. Hoffmann: Just the reference to 53?

The Court: Yes.

(The jury entered the courtroom at 11:40 a.m., and the following proceedings were had within the hearing and presence of the jury:)

The Court: Members of the jury, first let me apologize for the delay in answering the requests that you have given to the Court, but we have had some legal arguments on it, some time has ensued in trying to answer what I think might be an intelligent answer to the inquiries propounded.

Let the record note that this will be filed with the Court immediately.

> "Please clarify the following:
>
> "Section 2 of the Sherman Act, Section 7 of

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> of the Clayton Act, and can we find in favor of the plaintiff in one center and in favor of the defendant in another center, or must one verdict be applied to one center?
>
> "Foreman, George Pfeiffer
>
> "P.S. Will the last section of your charge answer these questions? If so, please read them."

Mr. Hoffmann: Your Honor, I am sure by sheer chance of inadvertence something happened just now which never happened to you in your career, but you read the phrase, I suggest, wrongly. The question was "or must one verdict be applied to all centers."

The Court: Let me read it again.

"Please clarify the following:

"Section 2 of the Sherman Act and Section 7 of the Clayton Act, and can we find in favor of the plaintiff in one center and in favor of the defendant in another center, or must one verdict be applied to all centers?"

What did I say, one? I think the writing, small L, no reflection, Mr. Foreman, on you.

"P.S. Will the last section of your charge answer these questions? If so, please read it."

Members of the jury, try to listen to me

[4790]

carefully.

You may find in favor of the plaintiff in one or more centers, or you may find in favor of the defendant in one or more centers.

One verdict does not necessarily have to be applied to all centers.

It is the Court's intent to repeat Section 2 of the Sherman Act.

Section 2 of the Sherman Act provides:

Every person who shall monopolize, or attempt to monopolize, any part of the trade or commerce among the several states shall be guilty of violating the law.

Section 7 of the Clayton Act provides:

No corporation shall acquire, directly or indirectly, the stock or assets of another corporation where the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly.

I also charge you that:

The term "monopolize," as used in the antitrust laws, refers to the power allegedly obtained and maintained

by the defendant for the purpose of removing or excluding competitors from the field of competition in a particular business

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or industry, in this case, the operation of bowling centers.

In this case the defendant has monopolized within the meaning of the antitrust laws if:

One, it has knowingly obtained or maintained monopoly power to remove or to exclude or keep out competitors from the field of competition.

Two, that the defendant possesses that power.

Three, that it has the purpose and intent to exercise that power to exclude or remove as to cause injury to the business of one or more of the plaintiffs.

Of course, if the power to remove or exclude competitors has been exercised and if, as a result of the exercise of such power, one or more competitors have been removed or excluded, monopolization has clearly occurred, but it is not necessary that competitors actually be removed or excluded from the field of competition if it appears from a preponderance of the evidence in the case that the three essential facts or conditions just stated have in fact occurred.

The term "attempt to monopolize" involves two essential elements:

[4792]

One, a specific or purposeful intent to monopolize.

Two, some act done in furtherance of that intent, but insufficient to produce a monopoly. In order to find an attempt to monopolize, both elements—the intent and the act—must appear, and must together result in a reasonable probability that a monopoly will sooner or later occur.

I further charge you if under the instructions of this

Court and the requests to charge of the plaintiffs and the defendant, which I have given to you, and which you will consider together with my regular instructions, you should find that the plaintiffs or any one of them are entitled to a verdict, the law provides that the plaintiffs or any one of them are to be fairly compensated for all damages, if any, to his business or property which was proximately caused by the defendant's conduct, in violation of the antitrust laws.

In arriving at the amount or amounts of award, if any, you should include all damages suffered by the plaintiffs or any one of them, because of lost profits; that is to say, profits which the plaintiffs or any one of them would have made but for the violation of the antitrust laws.

[4793]

If you find that the plaintiffs or any one of them has in fact suffered damage to his business or property, such as a loss in profits, proximately caused by the alleged illegal conduct of the defendant complained of, then the circumstance that the precise amount of plaintiffs' or any one of their damage claims may be difficult to ascertain, should not affect plaintiffs' recovery.

On the other hand, the plaintiffs or any one of them are not to be awarded remote or purely speculative damages. An allowance for lost profits may be included in the damages awarded, if any, only when there is some reasonable basis in the evidence for determining that plaintiffs have in fact suffered a loss of profits, even though the amount of such loss is difficult of ascertainment.

Thank you very much for your attention. Now will you please retire again?

(At 11:48 a.m. the jury retired for further deliberation.)

(At 1:55 p.m. the jury returned to the courtroom and rendered the following verdict through their foreman:

On Claim 2 for Brunswick and against plaintiffs on all counts of this claim.

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On Claim 3, in favor of Pueblo Bowl-O-Mat and against defendant in amount of $964,830; in favor of Holiday Bowl-O-Mat and against defendant in amount of $298,800; in favor of Paramus Bowl-O-Mat and against defendant in amount of $1,094,400; no cause for action as to Treadway Companies, Inc., Paradise Bowl-O-Mat, Inc., Indianapolis Bowl-O-Mat, Inc.)

(On motion of the Court the jury was duly polled and all concurred in verdict as rendered by their Foreman.)

• • •

DEFENDANT'S MOTION FOR DIRECTED VERDICT OR VERDICTS AT CLOSE OF PLAINTIFFS' CASE.

Now Comes the defendant, Brunswick Corporation, at the conclusion of the plaintiffs' case-in-chief, the plaintiffs having rested, and respectfully moves the Court to direct the jury to return a verdict against the plaintiffs and for the defendant on all claims of the plaintiffs herein.

In the alternative, the defendant respectfully moves the Court to direct the jury to return separate verdicts against each of the plaintiffs and for the defendant on the respective separate claims of the plaintiffs alleged as "Second Claim" and "Third Claim" in the complaint of the plaintiffs herein.

Brunswick Corporation,
Defendant

By

Miles G. Seeley
Thomas B. McNeill
Arthur C. Dwyer
Its Attorneys

DEFENDANT'S MOTION FOR DIRECTED VERDICT OR VERDICTS AT THE CLOSE OF ALL OF THE EVIDENCE.

Now Comes the defendant, Brunswick Corporation, at the close of all of the evidence herein, all parties having rested, and respectfully moves the Court to direct the jury to return a verdict against the plaintiffs and for the defendant on all claims of the plaintiffs herein.

In the alternative, the defendant respectfully moves the Court to direct the jury to return separate verdicts against each of the plaintiffs and for the defendant on the respective separate claims of the plaintiffs alleged as "Second Claim" and "Third Claim" in the complaint of the plaintiffs herein.

Brunswick Corporation,
Defendant

By

_____

_____

_____

Its Attorneys

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY (MAY 23, 1973).

This action having duly come on for trial before the Court and a Jury, Hon. Lawrence A. Whipple, District Judge, presiding, and the Court having instructed the Jury to render separate verdicts under each claim in favor of or against each of the particular plaintiffs asserting such claims and as to each claim found in favor of a plaintiff to assess damages against defendant Brunswick Corporation, or, alternatively, to find in favor of defendant Brunswick Corporation and against each of such plaintiffs or all of them, and the Jury having duly rendered separate verdicts, and the Court having found, based upon such separate verdicts, that defendant Brunswick Corporation is entitled to judgment against six of the plaintiffs with respect to claimed violations of 15 U. S. C. § 2 asserted in the Second Claim of the complaint, as amended at trial (Tr. 4388), and that three of the plaintiffs are entitled to judgments awarding them treble damages under 15 U. S. C. § 15, against the defendant Brunswick Corporation for violations of 15 U. S. C. § 18 as asserted in the Third Claim of the complaint, as amended at trial (Tr. 4309), it is hereby accordingly, now

ORDERED, ADJUDGED, AND DECREED, that

1. Plaintiff Pueblo-O-Mat, Inc., have judgment for treble damages under 15 U. S. C. § 15 in the sum of $2,894,490 against defendant Brunswick Corporation for violation of 15 U. S. C. § 18 as asserted in the Third Claim of the complaint;

2. Plaintiff Holiday Bowl O Mat, Inc., have judgment for treble damages under 15 U. S. C. § 15 in the sum of $896,400 against defendant Brunswick Corporation for violation of 15 U. S. C. § 18 as asserted in the Third Claim of the complaint;

3. Plaintiff Bowl-O-Mat Paramus Operations have judgment for treble damages under 15 U. S. C. § 15 in the sum of $3,283,200 against defendant Brunswick Corporation for violation of 15 U. S. C. § 18 as asserted in the Third Claim of the complaint;

4. Defendant Brunswick Corporation have judgments against plaintiffs Pueblo Bowl-O-Mat, Inc., Holiday Bowl-O-Mat, Inc., Bowl-O-Mat Paramus Operations, Paradise Bowl-O-Mat, Inc., Treadway Companies, Inc. (for losses claimed to have been suffered by the closing of Fort Lauderdale Bowl-O-Mat, Inc.), Treadway Companies, Inc. (for losses claimed to have been suffered by interest charges) and Indianapolis Bowl-O-Mat, Inc., with respect to the claims of monopolization and/or attempted monopolization asserted by them, under 15 U. S. C. § 2, and that the Second Claim of the complaint, as amended at trial (Tr. 4388), be dismissed with prejudice as to each of them;

5. This Court shall retain jurisdiction over this action for purposes of determining, upon proper application, the amounts of reasonable attorneys' fees and the costs of suit which may be appropriate for recovery against defendant Brunswick Corporation under 15 U. S. C. § 15, together with any other properly taxable costs, said costs to be recovered in one bill of costs. These amounts are to be assessed and entered at the foot of this judgment after disposition of the application therefor to be made to this Court on 20 days notice to defendant Brunswick Corporation;

6. This Court also shall retain jurisdiction over this action for purposes of determining, upon proper applica-

tion by plaintiffs, what forms of equitable relief, if any, are appropriate under 15 U. S. C. § 26 because of the three aforesaid violations of 15 U. S. C. § 18 by defendant Brunswick Corporation, including the equitable relief which the three plaintiffs identified in paragraphs 1, 2 and 3 hereof request in paragraph (c) of the prayer for relief under the Third Claim of the complaint and the equitable relief which all of the plaintiffs in this case except plaintiff Treadway Companies, Inc., request in paragraph (b) thereof; and it is further

ORDERED, ADJUDGED, AND DECREED, that

7. Defendant Brunswick Corporation have judgment against plaintiffs Pueblo Bowl-O-Mat, Inc. and Bowl-O-Mat Paramus Operations for the claimed violations of 15 U. S. C. § 1 asserted in the First Claim of the complaint, and said First Claim is dismissed with prejudice as to each of those two plaintiffs; said plaintiffs, through their counsel, having withdrawn said First Claim voluntarily during the Pre-Trial Conference held before the Court on March 6, 1973 (Tr. 6-7);

8. Defendant Brunswick Corporation have judgment against plaintiffs Saginaw Bowl-O-Mat, Inc., Muncie Bowl-O-Mat, Inc., Skore Lanes Bowl-O-Mat, Inc., Minneapolis Bowl-O-Mat, Inc. and Des Moines Bowl-O-Mat, Inc. with respect to the claims asserted by them in the complaint under 15 U. S. C. § 2 and that the Second Claim asserted in the complaint be dismissed with prejudice as to each of them, the Court having ruled at the close of plaintiffs' case that it should grant the motion of defendant Brunswick Coporation for a directed verdict as to each of those plaintiffs (Tr. 2073);

9. Brunswick Corporation have judgment against plaintiff Treadway Companies, Inc. with respect to the claim asserted by it in the complaint as amended (Tr. 4405) under 15 U. S. C. §18 and that the Third Claim of the complaint as amended be dismissed with prejudice as to it, plaintiff, through its counsel, having voluntarily withdrawn its claim under 15 U. S. C. § 18 with respect to Fort Lauderdale Bowl-O-Mat, Inc. (Tr. 4437) after the Court earlier had granted the motion of plaintiff Treadway Companies, Inc. to conform the pleadings to the proof by allowing said plaintiff to assert said claim under 15 U. S. C. § 18 (Tr. 4405).

10. This Court shall retain jurisdiction over this action for purposes of determining, upon proper application by defendant, the amount of costs, if any, which may be taxed against plaintiffs.

/s/ LAWRENCE A. WHIPPLE,
U. S. District Judge.

JUDGMENT ENTERED this ..... day of ....., 1973.

.....
Clerk.

Approved as to Form:

Law Firm of
MALCOLM A. HOFFMANN,
By (Name Illegible)
Attorneys for Plaintiffs.

STRYKER TAMM & DILL,
ARTHUR C. DWYER,
Attorneys for Defendant.

MOTION OF DEFENDANT FOR JUDGMENTS NOTWITHSTANDING THE VERDICTS AND IN THE ALTERNATIVE FOR A NEW TRIAL.

Now Comes Brunswick Corporation, defendant herein, a jury having heretofore on May 11, 1973 returned verdicts in this cause in favor of the plaintiffs Holiday Bowl-O-Mat, Inc., Bowl-O-Mat Paramus Operations and Pueblo Bowl-O-Mat, Inc. and against the defendant on the respective claims of said plaintiffs under Section 7 of the Clayton Act (15 U. S. C. § 18), the jury having assessed damages against the defendant in each of such verdicts, and the Court on May 31, 1973 having entered judgments against the defendant and in favor of each of said plaintiffs upon the said verdicts after trebling the amounts of the damages assessed by the jury, and respectfully moves pursuant to Rule 50(b) of the Rules of Civil Procedure that the Court set aside said verdicts for said damages and enter judgments notwithstanding said verdicts for the defendant and against each of said plaintiffs Holiday Bowl-O-Mat, Inc., Bowl-O-Mat Paramus Operations and Pueblo Bowl-O-Mat, Inc. on their respective claims under Section 7 of the Clayton Act.

In the alternative, the defendant respectfully moves the Court for a new trial on the issues herein raised by the claims of the plaintiffs Holiday Bowl-O-Mat, Inc., Bowl-O-Mat Paramus Operations and Pueblo Bowl-O-Mat, Inc., and the defendant's answers thereto, under Section 7 of the Clayton Act.

For grounds of its said motions for judgments notwithstanding the verdicts the defendant says that as a matter of law the Court should have directed verdicts for the defendant and against the plaintiffs Holiday Bowl-O-Mat, Inc., Bowl-O-Mat Paramus Operations and Pueblo Bowl-O-Mat, Inc. on their claims under Section 7 of the Clayton Act for the following reasons:

A. The plaintiffs failed to present any evidence from which the jury properly could find that the defendant's operation of Dutchess Lanes in Poughkeepsie, Fair Lawn Lanes in Fair Lawn, Interstate Lanes in Ramsey or Belmont Lanes in Pueblo gave rise to any reasonable probability that competition would be lessened or that a monopoly would be created in the operation of bowling centers in the respective local markets where such centers were located.

B. The plaintiffs failed to present any evidence from which the jury properly could find that Brunswick's operation of such centers in fact lessened competition or tended to create a monopoly in the operation of bowling centers in the respective areas where such centers were located.

C. The plaintiffs failed to present any evidence from which the jury properly could find that any of such plaintiffs has suffered any loss or damage from any lessening of competition or from anything tending to create a monopoly, the only "damage" evidence offered by the plaintiffs being evidence of unrealized profits which they would have made but for the fact that Brunswick, by its operation of the centers in question, preserved or increased competition in the respective local markets where such centers were located.

D. The plaintiffs failed to introduce any evidence that any of the respective corporations which previously operated Dutchess Lanes, Fair Lawn Lanes, In-

terstate Lanes and Belmont Lanes was engaged in interstate commerce.

E. The plaintiffs failed to introduce any evidence that Brunswick acquired any assets of the corporation which formerly operated Dutchess Lanes and Belmont Lanes.

F. The evidence established as a matter of law that each of the corporations which preceded Brunswick in the operation of Dutchess Lanes, Fair Lawn Lanes, Interstate Lanes and Belmont Lanes, as well as the corporation from whose trustee in bankruptcy Brunswick purchased the stock of Fair Lawn Lanes and Interstate Lanes, was a failing company and that therefore any acquisitions of their assets or stock were beyond the reach of Section 7 of the Clayton Act.

(i) The plaintiffs cannot deny that the competing centers which Brunswick operated were failing businesses without destroying the premise on which all of their "damage" evidence was based, namely, that if Brunswick had not operated the centers in question they would have gone out of business in 1965.

(ii) As a matter of law, American International Bowling Corporation was a failing company when its assets were auctioned off at a bankruptcy sale.

For grounds of its said motion in the alternative for a new trial, the defendant says:

(1) The Court erred as a matter of law in denying the defendant's motions for directed verdicts at the conclusion of the plaintiffs' evidence with respect to the claims of Holiday Bowl-O-Mat, Inc., Bowl-O-Mat Paramus Operations and Pueblo Bowl-O-Mat, Inc. under Section 7 of the Clayton Act.

(2) The Court erred as a matter of law in denying the defendant's motions for directed verdicts at the conclusion of all of the evidence upon the claims of said three plaintiffs under Section 7 of the Clayton Act.

(3) The verdicts in favor of the plaintiffs Holiday Bowl-O-Mat, Inc., Bowl-O-Mat Paramus Operations and Pueblo Bowl-O-Mat, Inc. under Section 7 of the Clayton Act are without foundation or support in the evidence.

(4) Said verdicts in favor of said three plaintiffs under Section 7 of the Clayton Act are contrary to the manifest weight of the evidence.

(5) The Court erred as a matter of law in admitting into evidence over the objection of the defendant the testimony of the plaintiffs' witnesses Lieblich, Kenney, Mendelson and Davis with respect to claimed additional profits which the plaintiffs Holiday Bowl-O-Mat, Inc., Bowl-O-Mat Paramus Operations and Pueblo Bowl-O-Mat, Inc. would have made if the defendant, beginning in 1965, had not operated Dutchess Lanes in Poughkeepsie, New York, Fair Lawn Lanes in Fair Lawn, New Jersey, Interstate Lanes in Ramsey, New Jersey, Ten-Pin-on-the-Mall in Paramus, New Jersey, Lodi Lanes in Lodi, New Jersey and Belmont Lanes in Pueblo, Colorado and if instead such centers had been closed.

(6) The Court erred as a matter of law in admitting into evidence over the objection of the defend-

ant Exhibit P-53, containing a summarization of the plaintiffs' claimed "damages" from the testimony referred to in the preceding assignment of error.

(7) The Court erred as a matter of law in giving to the jury over the objections of the defendant plaintiffs' requested instructions numbered 83 and 85, for the reasons that each of said instructions erroneously told the jury that the defendant's taking over the operation of Dutchess Lanes, Fair Lawn Lanes, Interstate Lanes, Ten-Pin-On-The-Mall, Lodi Lanes and Belmont Lanes were acquisitions in a line of commerce, namely, the operation of bowling centers, whereas, as a matter of law, the operation of bowling centers in a local area within a single state is not in itself a line of interstate commerce and no evidence was introduced showing that the operation of any of the bowling centers named above constituted trade or commerce among the several states or with foreign countries. Said instructions improperly took from the jury the question of whether the respective corporations which preceded the defendant in the operation of said centers were engaged in interstate commerce and in effect directed the jury to find for the plaintiffs on those issues. Said instructions as given by the Court appear on pages 4727 and 4729 of the transcript.

(8) The Court erred as a matter of law in giving to the jury plaintiffs' requested instructions numbered 84, 86, and 88. Each of such instructions left to the jury a question as to whether the operation by the defendant of certain bowling centers substantially lessened competition, despite the fact that there was

no evidence in the record that any competition was lessened by reason of such operations, but on the contrary all of the relevant evidence showed that as a result of such operations, competition in the bowling center business was either maintained or increased in the local bowling market where each such bowling center was located.

Each of these instructions improperly referred to the defendant as "the largest manufacturer of bowling supplies and equipment, as well as being the banker for its bowling center customers" because the claims of the plaintiffs under Section 7 of the Clayton Act related only to the operation of bowling centers in specified local market areas and there was no claim or evidence that the operation of such bowling centers had any effect upon, or was in any manner affected by, the defendant's activities in the manufacture of bowling supplies and equipment or the extension of credit to its customers.

Each of such instructions was incorrect as a matter of law in instructing the jury that the percentage of the relevant local bowling market "occupied" by the Brunswick operated centers constituted sufficient evidence in itself to support a finding that competition had been lessened by Brunswick's taking over the operation of such centers, whereas in fact, as shown by all of the evidence, each of said centers was in existence prior to its operation by Brunswick and represented the same percentage of the local bowling market before Brunswick's operation as after and the operation of such centers by Brunswick in no way lessened competition in said markets but on the contrary maintained or increased such competition.

Each of such instructions was further erroneous in law because in effect it took from the jury the issue

as to whether competition had been lessened in the market areas in question and left them no alternative to finding for the plaintiffs on those issues. Said instructions as given by the Court appear on pages 4727-4731 of the transcript.

(9) The Court erred in giving to the jury plaintiffs' suggested instructions numbers 118, 119, 122, 127, 128, 129, 132, 133 and 134 for the following reasons. These instructions as given by the Court appear on pages 4736-4742 of the transcript.

(a) These instructions erroneously required the jury to assess damages against the defendant based upon the estimated amount of business and profits which would have come to plaintiffs' bowling centers if Brunswick had not operated competitive bowling centers. This overlooked the fact that as a matter of law the plaintiffs could not be damaged by the mere taking over for operation by the defendant of a competing bowling center, but only could suffer legally recoverable damage in the event that as a result of such operation by the defendant competition in the local market for bowling was lessened. On the record, no such lessening of competition occurred in any of the areas in question. The "damages" which these instructions permitted the jury to find were in fact estimated additional profits plaintiffs were not able to achieve because of the preservation of competition and hence could not have been caused by any lessening of competition, and therefore could not be damages properly awarded on account of a claimed violation of Section 7 of the Clayton Act.

(b) These instructions required the jury to accept the testimony of the plaintiffs' "damages" witnesses at its face value, without giving any weight to the possible interest or bias of the witnesses or to circumstances shown by the evidence which might have led the jury to believe that the estimates were unrealistic.

The testimony of these witnesses, who testified as experts was in the form of opinions. Telling the jury that they were required to accept these opinions as "the truth" unless the witnesses were "discredited or impeached" erroneously and prejudicially applied to opinion testimony standards which are applicable only to factual testimony.

(c) These instructions, taken as a group, amounted to instructing the jury that if they found for the plaintiffs on the issues of whether the defendant had violated Section 7 of the Clayton Act, they were required to return verdicts assessing damages in the amounts claimed by the plaintiffs. Taken in connection with plaintiffs' requested instructions 83-88, 133 and 134 which in effect erroneously instructed the jury that it was required to find for the plaintiffs on the issue of violations of Section 7 by the defendant, these instructions amounted to directing a verdict for the plaintiffs on their Section 7 claims in the amounts claimed by them as damages. The use of the words "must assess damages" in plaintiffs' requested instructions 133 & 134 emphasized the mandatory nature of this series of instructions.

(d) Although at other points in the Court's charge, unconnected with these instructions, the Court gave seemingly contradictory instructions which purported to leave to the jury issues for them to decide under the plaintiffs' Section 7 claims, these instructions are not qualified by any reference to such other and contradictory instructions. If the jury considered all of the instructions which the Court gave on the questions of liability and damage under Section 7 of the Clayton Act, they only could have been confused.

(e) Plaintiffs' requested instructions numbers 122 and 127 told the jury that the amount of damages they might find for the plaintiff Pueblo Bowl-O-Mat, Inc. was from $964,830 to $1,072,030. The jury's verdict in favor of that plaintiff found damages in the lower of the above amounts. Part of these claimed damages are not recoverable under the plaintiffs' Section 7 claim because they relate to a twenty month period prior to April 1, 1965 when the defendant began to operate Belmont Lanes. Based upon the calculations whereby the plaintiffs' witnesses arrived at the above amounts, $166,684 of the damages assessed in favor of Pueblo Bowl-O-Mat, Inc. related to the period prior to April 1965 and should not have been included in the assessed damages under any theory. The inclusion of that amount of improper single damages resulted in a judgment in favor of the plaintiff Pueblo Bowl-O-Mat, Inc. which is $500,051 greater than such plaintiff is entitled to on any theory, in view of the jury's having elected to calculate damages on the lowest estimate given by the plaintiffs' witnesses.

All of the foregoing grounds upon which defendant's motion is based will be explicated in the defendant's supporting Brief which will be filed in accordance with local Rule 12(C).

BRUNSWICK CORPORATION,
Defendant

By ARTHUR C. DWYER
Arthur C. Dwyer

STRYKER, TAMS & DILL
33 Washington Street
Newark, New Jersey 07102

Attorneys for Defendant

MILES G. SEELEY
THOMAS B. MCNEILL
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604

Of Counsel

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY (OCTOBER 1, 1973).

This cause having duly come on to be heard before the Honorable Lawrence A. Whipple, District Judge, on motion of defendant Brunswick Corporation, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, for judgments notwithstanding the verdicts and in the alternative for a new trial with respect to the verdicts returned on May 11, 1973 in favor of plaintiffs Holiday Bowl-O-Mat, Inc., Bowl-O-Mat Paramus Operations and Pueblo Bowl-O-Mat, Inc. and the judgments entered on said verdicts on May 31, 1973, and the Court, having heard the arguments of counsel, being fully advised and having filed its opinion ruling upon said motions on September 17, 1973, it is

ORDERED that defendant's motion for judgments notwithstanding the verdicts be and hereby is in all respects denied, and it is further

ORDERED that defendant's motion for a new trial be and hereby is in all respects denied, except that it is

ORDERED that defendant's motion for a new trial solely on the issue of the amount of damages to be awarded to plaintiff Pueblo Bowl-O-Mat, Inc. is granted unless within 5 days after entry of this order, Pueblo Bowl-O-Mat, Inc. file with the Clerk of the Court a written consent to reduce the verdict in its favor from $964,830 to $798,480, and to reduce the judgment entered on May 31, 1973, in its favor under 15 U. S. C. § 15 from $2,894,490 to $2,395,440, in which event the motion for a new trial shall be in all respects denied and, it is further

ORDERED, in view of the fact that Pueblo has executed the annexed Consent to Reduce Verdict and Judgment dated September 25, 1973, that defendant's motion for a new trial be and hereby is in all respects denied, and that paragraph (1) of the judgment entered on May 31, 1973 provide as follows:

> (1) Plaintiff Pueblo Bowl-O-Mat, Inc., have judgment for treble damages under 15 U. S. C. § 15 in the sum of $2,395,440 against defendant Brunswick Corporation for violation of 15 U. S. C. § 18 as asserted in the Third Claim of the complaint.

/s/ LAWRENCE A. WHIPPLE
U. S. D. J.

10/1/73

APPROVED AS TO FORM:

LAW FIRM OF MALCOLM A. HOFFMANN

By MALCOLM A. HOFFMANN
Attorneys for Plaintiffs

MAYER, PLATT & BROWN.

By THOMAS B. MCNEILL
Attorneys for Defendant

DEFENDANT'S NOTICE OF APPEAL

Notice is hereby given that Brunswick Corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the final judgments against it and in favor of the plaintiff Pueblo Bowl-O-Mat, Inc. in the sum of $2,894,490, the plaintiff Holiday Bowl-O-Mat, Inc. in the sum of $896,400 and the plaintiff Bowl-O-Mat Paramus Operations in the sum of $3,283,200, entered in this action on the 31st day of May, 1973, as amended by this Court's Order of October 1, 1973 reducing the judgment in favor of plaintiff Pueblo Bowl-O-Mat, Inc. to the sum of $2,395,440.

Dated October 2, 1973.

WILLIAM L. DILL, JR.
William L. Dill, Jr.

STRYKER, TAMS & DILL
Stryker, Tams & Dill
33 Washington Street
Newark, New Jersey 07102
Attorneys for Defendant.

MILES G. SEELEY
THOMAS B. MCNEILL
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
Of Counsel

COURT OF APPEALS OPINION

(August 14, 1974).

PER CURIAM

The notice of appeal in No. 73-2010, filed on October 2, 1973, is from the "final judgments against [defendant] and in favor of the plaintiff Pueblo Bowl-O-Mat, Inc. in the sum of $2,894,490, the plaintiff Holiday Bowl-O-Mat, Inc. in the sum of $896,400 and the plaintiff Bowl-O-Mat Paramus Operations in the sum of $3,283,200, entered in this action on the 31st day of May, 1973, as amended by this Court's Order of October 1, 1973 reducing the judgment in favor of plaintiff Pueblo Bowl-O-Mat, Inc. to the sum of $2,395,440." Appendix at 106a. The appeal was briefed and argued by appellant and appellees on the assumption that the May 31, 1973 judgment, entered on a jury verdict, was in fact a final judgment. On July 9, 1974 there was referred to this panel a motion by defendant-appellant in No. 74-1621 to have plaintiffs-cross-appellants in No. 74-1622 deemed appellants. We then learned for the first time that appeals No. 74-1621 and No. 74-1622 were from a district court order in the same case as is before us in No. 73-2010, awarding counsel fees. This information prompted an examination of the judgment appealed from which provides:

> "5. This Court shall retain jurisdiction over this action for purposes of determining, upon proper application, the amounts of reasonable attorneys' fees and the costs of suit which may be appropriate for recovery against defendant Brunswick Corporation under 15 U. S. C. § 15, together with any other properly taxable costs, said costs to be recovered in one bill of costs. These amounts are to be assessed and entered at the foot of this judgment after disposition of

> the application therefor to be made to this Court on 20 days notice to defendant Brunswick Corporation;
>
> 6. This Court also shall retain jurisdiction over this action for purposes of determining, upon proper application by plaintiffs, what forms of equitable relief, if any, are appropriate under 15 U. S. C. § 18 by defendant Brunswick Corporation, including the equitable relief which the three plaintiffs identified in paragraphs 1, 2 and 3 hereof request in paragraph (c) of the prayer for relief under the Third Claim of the complaint and the equitable relief which all of the plaintiffs in this case except plaintiff Treadway Companies, Inc., request in paragraph (b) thereof . . . . Appendix at 70a.

The complaint seeks damages pursuant to § 4 of the Clayton Act, 15 U. S. C. § 15 and injunctive relief pursuant to § 16 of the Clayton Act, 15 U. S. C. § 26. The jury verdict disposed of the § 4 claim. Our inquiry has disclosed that the § 16 claim for equitable relief, referred to in paragraph 5 of the judgment appealed from, has not to date been disposed of.

Neither the order appealed from in No. 73-2010 nor the order appealed from in Nos. 74-1621 and 74-1622 contain a certificate pursuant to Rule 54(b), Fed. R. Civ. P. Obviously neither order disposed of all claims since the § 16 Clayton Act claim is still pending. In the absence of a Rule 54(b) certification we lack jurisdiction over these appeals. Thus the three appeals will be dismissed. In the event of an appeal from a final judgment disposing of all claims, or if the district court should in its discretion enter a Rule 54(b) certification with respect to the May 31, 1974 order prior to its disposition of the claim for equitable relief, the briefs and appendices filed in No. 73-2010 may

be filed with respect to the jury's verdict on the § 4 Clayton Act claim. It seems obvious, however, that a single panel of this court should consider the order disposing of the § 4 Clayton Act claim, the order disposing of the § 16 Clayton Act claim for injunctive relief, and the fee order. Thus if these matters come before us on separate appeals in the future the clerk should consolidate them.

AMENDED JUDGMENT OF COURT OF APPEALS

(September 5, 1974).

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the appeals in the above-entitled cases be, and the same are hereby dismissed. Taxation of costs to abide the event of any new appeals in this matter.

Attest:

THOMAS F. QUINN,
Clerk.

September 5, 1974

Certified as a true copy and issued in lieu of a formal mandate on September 5, 1974.

Test: THOMAS F. QUINN,
Clerk, United States Court of Appeals for the Third Circuit.

SUPPLEMENTAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(September 17, 1974).

This action having duly come on for trial before the Court and a Jury, the Honorable Lawrence A. Whipple, District Judge, presiding, and the Jury having duly rendered separate verdicts on May 11, 1973, and the Clerk of the Court, based upon such separate verdicts,

(a) having entered a judgment of the Court on May 31, 1973 awarding three of the plaintiffs treble damages under 15 U. S. C. § 15 against the defendant Brunswick Corporation for its violations of 15 U. S. C. § 18 asserted in the Third Claim of the complaint as amended at trial (Tr. 4309), and

(b) having entered an order of the Court on October 5, 1973, amending the judgment entered May 31, 1973, and denying in all respects the post-trial motions of defendant Brunswick Corporation brought under F. R. C. P. 50(b) and

(c) having entered an order of the Court on April 2, 1974, awarding the costs of suit, including a reasonable attorney's fee, to the three prevailing plaintiffs under 15 U. S. C. § 15, and directing that the amounts thereof be entered at the foot of the judgment entered May 31, 1973,

and the United States Court of Appeals for the Third Circuit, in its amended judgment filed September 5, 1974, having dismissed for lack of jurisdiction the appeal from the judgment entered on May 31, 1973, as amended by the order entered October 5, 1973, and the appeal and cross-appeal taken from the order entered April 2, 1974,

and in its opinion filed on August 14, 1974 having expressly granted permission to the Court to make any certifications under F. R. C. P. 54(b) it deems necessary and proper, and it appearing from said opinion that said Circuit Court believed that the above-described judgment and two orders failed to provide for an express determination that there is no just reason for delay and for an express direction for the entry of final judgment as required by F. R. C. P. 54(b),

NOW, THEREFORE, in order that said Circuit Court may have full jurisdiction over and the power to review any appeal or appeals from the above-described judgment and two orders,

IT IS ORDERED:

1. That there is no just reason for delay in the making of an order with respect to the judgment previously entered on May 31, 1973, and the orders previously entered on October 5, 1973 and April 2, 1974.

2. That final judgments now be entered as set forth in said judgment entered on May 31, 1973, and said orders entered on October 5, 1973, and April 2, 1974.

3. That this supplemental order be considered as rendered *nunc pro tunc* as concerns the judgment entered on May 31, 1973, and interest thereon at the appropriate legal rate or rates commence running on May 31, 1973, except that the time for any appeal therefrom shall commence running from the date of entry of this supplemental order.

4. That this supplemental order be considered as rendered *nunc pro tunc* as concerns the order entered on October 5, 1973, except that the time for any appeal therefrom shall commence running from the date of entry of this supplemental order.

5. That this supplemental order be considered as rendered *nunc pro tunc* as concerns the order entered on April 2, 1974 and interest thereon at the appropriate legal rate or rates commence running on May 31, 1973, except that the time for any appeal therefrom shall commence running from the date of entry of this supplemental order.

6. That this Court continue to retain jurisdiction over this action for purposes of determining, upon proper application, the amounts of reasonable attorneys' fees and the costs of suit, above and beyond those awarded in the Court's order entered on April 2, 1974, which may be appropriate for recovery against defendant Brunswick Corporation under 15 U. S. C. § 15, the amount of said Attorneys' fees and costs to be assessed and entered at the foot of the judgment entered on May 31, 1973, as provided for and contemplated by paragraph 5 of said judgment.

7. That this Court shall continue to retain jurisdiction over this action for purposes of disposing of the application made by plaintiffs on October 15, 1973 seeking a ruling as to what forms of equitable relief, if any, are appropriate under 15 U. S. C. § 26 because of the violations of 15 U. S. C. § 18 by defendant Brunswick Corporation, as provided for and contemplated by paragraph 6 of the judgment entered May 31, 1973.

8. That this Court's retention of jurisdiction over this action for purposes described in paragraphs 6 and 7, *supra*, shall in no respect defeat or diminish the certification under F. R. C. P. 54(b) provided for in this supplemental order

or the purposes for which such certification was made as described in this supplemental order.

LAWRENCE A. WHIPPLE,
U. S. District Judge.

SUPPLEMENTAL ORDER filed this 17th day of September 1974.

.....

Approved as to Form:

MALCOLM A. HOFFMANN
Attorneys for Plaintiffs.

.....
Attorneys for Defendant.

I hereby certify that the foregoing is a TRUE COPY of the original on file in my office.

ANGELO W. LOCASCIO,
Clerk.

Per JUNE M. CUNNINGHAM,
Deputy.

DEFENDANT'S NOTICE OF APPEAL.

(September 26, 1974.)

Notice is hereby given that Brunswick Corporation, defendant above-named, hereby appeals to the United States Court of Appeals for the Third Circuit from the judgments entered against it in this action on May 31, 1973, as amended by this Court's orders entered on October 5, 1973, April 2, 1974, and September 24, 1974 in favor of the plaintiff Pueblo Bowl-O-Mat, Inc. in the sum of $2,395,440, the plaintiff Holiday Bowl-O-Mat, Inc. in the sum of $896,400 and the plaintiff Bowl-O-Mat Paramus Operations in the sum of $3,283,200, and entered against it on April 2, 1974 and in favor of the plaintiffs Pueblo Bowl-O-Mat, Inc., Holiday Bowl-O-Mat, Inc. and Bowl-O-Mat Paramus Operations for attorneys' fees and other costs of suit in the aggregate sum of $446,977.32, said judgments by Supplemental Order entered in this action on September 24, 1974 having been certified as and directed to be entered as final judgments.

DATED: September 26, 1974.

STRYKER, TAMS & DILL,

By WILLIAM L. DILL, JR.
William L. Dill, Jr.
Attorneys for Defendant.

MILES G. SEELEY,
THOMAS B. MCNEILL,
MAYER, BROWN & PLATT,
231 South LaSalle Street,
Chicago, Illinois. 60604
Of Counsel.

DEFENDANT'S NOTICE OF APPEAL.

(February 7, 1975)

Notice is hereby given that Brunswick Corporation, defendant above-named, hereby appeals to the United States Court of Appeals for the Third Circuit from the Final Judgment on Equitable Relief against it and in favor of the plaintiffs Pueblo Bowl-O-Mat, Inc., Holiday Bowl-O-Mat, Inc. and Bowl-O-Mat Paramus Operations, entered in this action on the 9th day of January, 1975.

STRYKER, TAMS & DILL
By /s/ WILLIAM L. DILL, JR.
William L. Dill, Jr.
Attorneys for Defendant

DATED: February 7, 1975.

Miles G. Seeley
Thomas B. McNeill
Mayer, Brown & Platt
231 South LaSalle Street
Chicago, Illinois 60604
Of Counsel

I certify that a copy of the within notice of appeal was served upon Messrs. Cole, Geaney & Yamner and upon Malcolm A. Hoffmann, Esq., attorneys for plaintiffs, by certified mail, return receipt requested, on February 7, 1975.

STRYKER, TAMS & DILL
By /s/ WILLIAM L. DILL, JR.
William L. Dill, Jr.
Attorneys for Defendant

JUDGMENT OF THE COURT OF APPEALS.

(August 29, 1975)

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted on briefs.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered May 31, 1975, as amended by the orders of the said District Court entered October 5, 1973, and September 24, 1974, which judgment and orders granted damages to the plaintiff-appellees in case No. 74-2127, and the judgment of the said District Court entered on January 9, 1975, which judgment granted equitable relief to the plaintiff-appellees in case No. 75-1152, be, and the same are hereby reversed; the order of the said District Court entered April 2, 1974, as amended by the order of the said District Court entered September 24, 1974, which orders granted an attorney's fee to the plaintiff-appellants in case No. 74-2128, be, and the same are vacated and the cause remanded to the said District Court for further proceedings in accordance with the opinion of this Court. Costs taxed against appellees in cases numbered 74-2127 and 75-1152.

ATTEST:
/s/ THOMAS F. QUINN
CLERK

August 29, 1975